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ABSTRACT

This guide offers a comprehensive basis from which administrators of day care centers can identify legal issues and become aware of laws applying to the resolution of those issues. Sections of the guide focus on (1) choosing an organization type, (2) forming the organization, (3) formal legal requirements in establishing the program, (4) basic management considerations, (5) insurance and contracts, (6) liability and board/director/staff legal relationships, (7) licensing requirements, (8) zoning, (9) aspects of personnel law (wages, benefits, and working conditions), (10) anti-discrimination, (11) medical care and treatment, (12) issues relating to custody, (13) responding to suspected cases of child abuse and neglect, (14) serving handicapped children, and (15) maintenance of records and the right to privacy. While much of the handbook does not address itself specifically to problems of family day care providers, some material is relevant to operators of family day care programs. (BJD)

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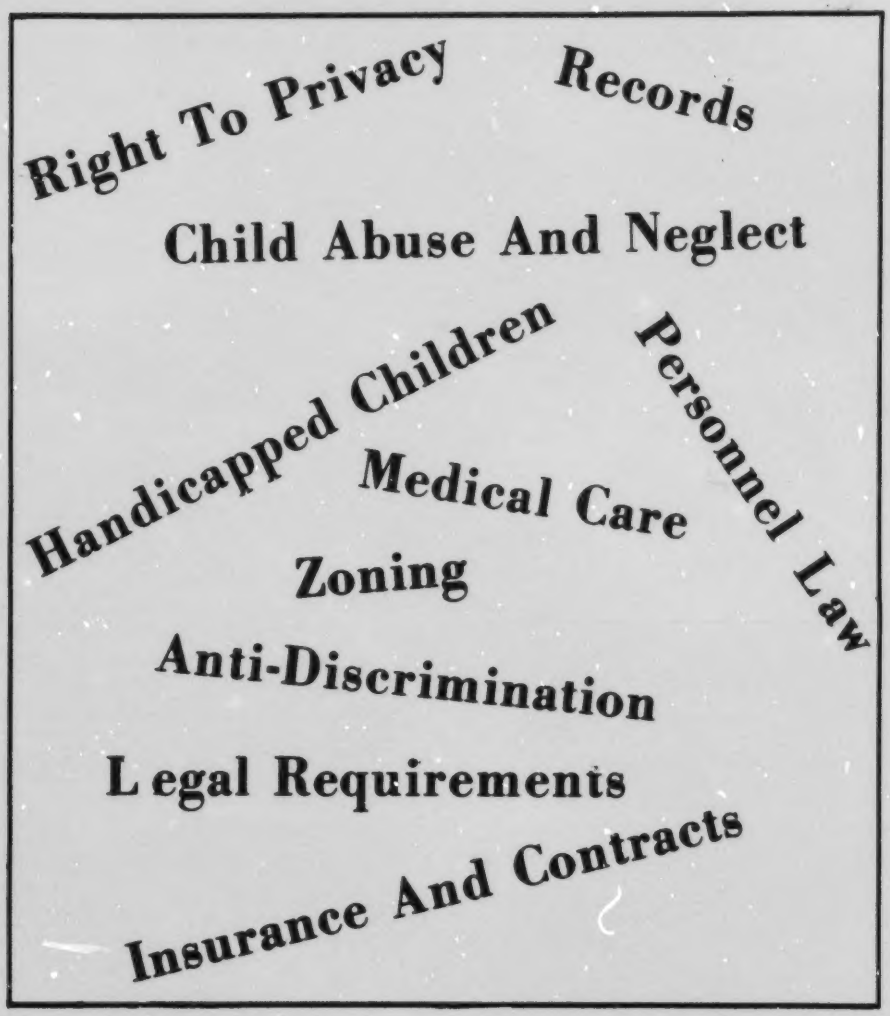

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INTRODUCTION

This Legal Handbook For Day Care Centers is the result of a detailed revision and major expansion of a handbook (Day Care Legal Handbook) developed at Wheelock College and written in 1977 by William F. Aikman, Esq. for the Day Care and Child Development Council of America, Inc. This new Handbook adds nine subject areas which were not included in the earlier handbook. The combined result of this expansion in subject matter and the extensive revision of the material in the original handbook is a comprehensive source book on those areas of the law which appear to be of greatest concern and interest to operators of day care centers.

The Handbook does not address itself specifically to the problems of family day care providers because of funding limitations. However, much of the material in the Handbook is relevant to the operators of family day care programs.

The content of this Handbook is intended to be a distillation of the legal concepts which are involved in each subject area covered by the Handbook. It does not purport to be a "nuts and bolts" approach to organizing and operating a day care center, since several books of this type have already been published. Nor is it merely a superficial view of legal issues which is also available in published materials. Rather, it is an effort to meet a need which exists in the area of day care by providing a comprehensive basis from which day care centers can identify legal issues and be aware of the laws which apply to the resolution of those issues. In this regard, it should be emphasized that the Handbook is intended to be a guide for day care centers and not a source from which they should expect to receive specific answers to particular issues. These answers will always require the application of local law to the particular fact situation at issue and frequently will require the advice of a lawyer.

In writing this Handbook, an effort has been made to strike a balance between a style which communicates easily to a lay audience and one which is precise enough for use by lawyers. In fact, it is hoped that the Handbook will be as useful to lawyers representing day care centers as it is to the boards of directors and administrators of those centers.

As in the case of any effort to produce a general handbook for a national audience, an effort has been made to write at a level of generalization which is specific enough to be meaningful while recognizing the variations in practice between the states and their localities, and the widely varying experiences, problems and stages of development of day care around the country.

The research and writing for the original Day Care Legal Handbook, which is incorporated in revised form in the first six chapters of the current Handbook, were supported in part by funds provided by the Ford Foundation. Work on the present Handbook was completed pursuant to a subcontract between the authors and Lawrence Johnson & Associates, Inc. (Washington, D.C.). The funding for this project has been provided by the Day Care Division of the Administration for Children, Youth and Families, Office of Human Development Services, United States Department of Health and Human Services.

A number of individuals helped us in the development of this Handbook. In particular, we would like to acknowledge the invaluable advice and assistance received from Gwen Morgan and Stacie Jacob Webb, both of whom also reviewed and commented upon the Handbook when it was in draft form, and from Lujuana Wolfe Treadwell of the Bay Area Child Care Law Project. We would also like to express our appreciation to Dr. Paulette Coleman, Project Director for Lawrence Johnson & Associates, who provided continuous and helpful support throughout the project. Also, we would like to thank Robyn O'Connell who was responsible for the physical preparation and production of the Handbook and whose patience and skill were deeply appreciated.

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Boston, Massachusetts
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CHAPTER I

CHOOSING AN ORGANIZATION TYPE

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- Characteristics of Sole Proprietorships
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Chapter I

CHOOSING AN ORGANIZATION TYPE

OVERVIEW

In order to avoid a multitude of potential problems, it is important to recognize the aspects of day care which are affected by business regulations and other legal considerations. This is especially true for center program directors who are hired by the board to handle such matters and not simply to run a good day care program.

In thinking about operating a day care program, the first legal matter which must be decided is the question of what type of organization should be used for the program. Essentially, this is a matter of matching the legally permitted types of organization with the needs and plans of the program operators and consumers and deciding which type is most appropriate. The decision about type of organization is the initial decision around which all other legal-related decisions will focus. It is the decision which determines the legal structure, as opposed to the physical structure (i.e., the building), within which all the program's activities must take place.

There are three major types of organizational structure which can be used for the operation of a private day care program (i.e., one not run by a governmental agency):

- sole proprietorship;
- partnership;
- corporation.

Two of these types, the partnership and the corporation, each have several sub-types with important differences among them. The number and nature of legal rules and regulations affecting the day care program vary depending on which of these basic types of organizational structure it adopts.

This chapter has three purposes: (1) to outline the major issues which should be considered when deciding which organizational structure to use for the program, (2) to describe the basic types of organizational structure which can be used for programs, and (3) to compare the characteristics of each of those organizational types.

No hard and fast rules can be given about which type of organization is best for a day care program. The best organizational form is the one which most easily meshes with the goals and intentions of those who will operate the program, the requirements and recommendations of those who will be funding it, and the needs and desires of those who will use it. Only the organizers of the program themselves can make this decision; the material in this chapter is intended to raise the questions and provide the information which the organizers should consider in the course of making the decision.

Often, the decision about organizational structure will be dictated by financial considerations. In a number of states day care centers are required by law to be incorporated before they can be eligible to receive governmental funds (for instance, Title XX funds).

THE MAJOR ISSUES

Whether you are starting a day care center, changing the organizational form of an existing center, or creating another organization which will be affiliated with a day care center, you should think through several important issues before making a final choice as to type of legal organization. There are three major issues which should determine the decision:

- the ease of operation which the organizers consider necessary;
- the nature and extent of liability which the organizers consider acceptable;
- the type of tax status which is desired.

After the organizers of the center have thought through their positions regarding each of these issues, it should be relatively clear which of the basic forms of organization is most adaptable to their needs and interests.

Ease of Operation

Day care center organizers need to decide the issue of how much managerial complexity they are able to take on and how much flexibility they think will be necessary in order to keep the organization going. This determination can be made by thinking about three things: (1) the volume and complexity of daily tasks which the individuals who will be operating the center will be able to undertake effectively and responsibly, (2) the volume and

complexity of long-term tasks which those same individuals will be able to undertake effectively and responsibly, and (3) the relative ease of making changes in the daily and long-term operational tasks, as well as in the personnel performing them, which will be necessary to the success of the organization.

The daily tasks of operation include such matters as bookkeeping, communicating with funding sources, dealing with licensing and other regulatory agencies, dealing with vendors, etc. The long-term tasks include such matters as filing periodic reports with state and federal tax authorities, with local and state permit-granting authorities and with other official governmental agencies, as well as such matters as preparing for financial audits and developing reliable projections of income and expenses, staffing needs, etc. The ease with which changes can be effected in the operational tasks and in the personnel performing them can be important if the organizers are unsure of the future directions of their venture or if they suspect that a certain level of operations may become too complex or too time-consuming to be maintained.

Nature and Extent of Liability

The issue of the nature and extent of acceptable liability is basically a question of the amount of potential personal financial responsibility to which the people running the center are willing to expose themselves. In other words, to what extent are the people running the center willing to run the risks of being personally liable for any expenses that might result from anything which goes wrong at the center. The catalog of things which might go wrong is, of course, nearly endless and includes everything from children getting burned in the kitchen to bookkeepers being overly generous with governmental funds.

Are the people running the center willing to take the risk: (1) that something serious might go wrong, (2) which results in someone having a valid claim against the center for a considerable amount of money, (3) which the people running the center would have to pay out of their own pockets? Or do the center operators want the maximum amount of protection from these risks which can be legally arranged?

In order to make this decision, it is necessary to be somewhat familiar with the various types of liability which the law creates. The law imposes liability--usually in the form of financial penalties--for three basic categories of acts:

. crimes;

. torts;

. breaches of contract.

In terms of the operation of day care programs, it is liability for torts and breaches of contract which are most important.

Torts. A tort is a civil wrong. It is an act which the law penalizes but which is not a crime (hence the description "civil"). Leaving a banana peel on the floor where someone might slip on it is a tort if someone is injured as a result. Failing to shovel the snow off your steps before the kids arrive is a tort if a child slips and is injured. Saying things about another person which amount to slander is a tort. Taking home and using as your own a piece of personal property--such as a coat--which someone left in the center is a tort. Virtually any act which is punished by the law and which is not a crime and not a breach of contract is a tort. (For a fuller description of the varieties of torts, see the "Types of Legal Responsibility" section of Chapter VI.)

Torts are wrongs which are committed either against "the person" (the body) of another individual or against property belonging to another individual. It is not uncommon for a certain act to be both a tort and a crime. When this is the case, the act is sometimes given the same name, both as tort and as crime, and is sometimes given different names, one to characterize the act as a tort and another to characterize it as a crime. An example of the same-name category would be a situation where you enter someone's home without a prior specific invitation; this is called "trespass" both in criminal law and in tort law. An example of the different-name category is taking someone's coat and using it as your own; this is called "larceny" in criminal law but is called "conversion" in tort law. The act is the same, it's just given a different name depending on whether you think of it as a crime or as a tort.

Whether the act is treated as a crime or a tort is determined by the "victim" (the owner of the house or the coat). Wherever an act is illegal under both criminal and civil (tort) law, the victim has a choice as to whether to pursue a criminal remedy or a civil remedy. If the criminal route is chosen, the victim will file a complaint with the police charging you with a crime. If the civil route is chosen, the victim will file suit against you demanding to be paid "damages" (money). The victim can pursue both remedies at the same time if s/he chooses.

Breaches of contract. The other major area of civil law which carries the constant possibility of personal financial liability is the law of contracts. Every day care center enters into dozens of contracts in the course of the year. Frequently, however, the operators of the center do not realize that the transaction involves a contract. This usually occurs because of the mistaken notion that a contract has been entered into only when one signs a very formal looking document that is written in very official language and is labelled "Contract" or "Agreement" at the top. In fact, binding contracts can be entered into in a number of different ways and do not require any particular formalities--not even a written statement.

A transaction does not need to be called a contract by the parties in order to be a contract. A mere purchase order can be a contract if properly issued by the center and properly filled by the vendor. An oral contract may be entered into which is just as binding as the most official-looking written contract.

The essential elements of a contract are explained in Chapter V. If these elements are present in any transaction, a valid contract has been entered into. Valid contracts are said to be "binding" on each party. This means that if one party violates a condition of the contract--"breaches" it in legal terms--then he or she becomes legally liable to the other party for the financial consequences of that breach.

In terms of amount of potential ultimate financial liability, torts give rise to much greater concern than breaches of contract since, usually, the amount of loss caused by a tort is much greater than that caused by a breach of contract. On the other hand, the amount of loss from a breached contract can be substantial if a day care center is a reasonably large operation, and if it breaches a major contract such as a lease (which is considered to be a contract in most states). In addition, as is explained in Chapter V, it is possible to protect against tort liability through insurance but, with certain limited exceptions, no such protection is available against liability for breaches of contract.

Because of the obvious tremendous impact of becoming personally liable for the financial consequences of a tort or a breach of contract, many people choose the legal form for their day care program which minimizes this potential liability. The form which gives the most protection against personal liability is the corporation, as is explained later in this chapter.

Tax Status

Profit-making centers. For day care centers which are being organized on a profit-making basis, the issue of the type of tax status poses a four-part question: Who gets taxed, when, at what rate, and involving how much paperwork?

The question of who gets taxed involves deciding whether the individuals operating the center prefer to take the center's income as their own and pay taxes on it personally or whether they prefer the center--as an organization--to pay its own taxes in which case the operators take their personal income only in the form of salaries and dividends.

The question of when taxes are paid simply involves remembering that, depending on the type of organization and on the amount of income involved, various taxes may have to be paid at different times, e.g., annually, quarterly, monthly, etc.

The question of tax rate is a reminder that the income of corporations is taxed at a different rate from that of individuals, and also that individuals themselves are subject to a wide range of rates. This must be taken into consideration when trying to decide the most advantageous form of organization.

The question of paperwork is a reminder that the amount of paperwork (returns, reports, forms, notices, etc.) required by federal and state tax authorities varies, depending on the legal form of organization adopted for the day care program.

The implications of each of these questions will become clearer after reviewing the material in the next two sections of this chapter.

Not-for-profit centers. Except for the amount of paperwork required to be filed, the four questions just outlined above need not concern a not-for-profit day care program, provided the program has filed for federal tax-exempt status. For programs which are to be operated on a not-for-profit basis, the major tax issue is whether they are organized and operated in a manner whch makes them eligible for tax-exempt status. The details regarding tax-exemption are discussed in the next section; at this point--the time of initial choice of organization form--it is important only to remember that a center must be organized as a not-for-profit corporation before it can be eligible for tax-exempt status. There is no such thing as a tax-exempt partnership or a tax-exempt sole proprietorship.

TYPES OF ORGANIZATIONS

As indicated earlier, there are three basic types of organizational structure within which a day care center can be operated: sole proprietorships, partnerships, and corporations. And both partnerships and corporations have several different sub-types, the differences among which have important implications for day care operators.

Sole Proprietorships

The sole proprietorship is the simplest of all types of organization. Indeed, in its most basic form, it is not really an "organization" in the literal sense at all; it is merely a single individual engaged in some self-employment activity. However, even in that basic form, there are certain business regulations and other legal rules which apply. Therefore, it is classified as a form of organization in the legal sense even if there is, in fact, no real "organization" of any sort to support the individual.

On the other hand, since "sole proprietorship" is a legal category and not a literal description, it is just as possible for a very large organization, composed of dozens of employees, to be a sole proprietorship as for a single individual to be one. The determining factor is simply whether the entire operation, no matter how large or small, is owned by one person who has no partners and is not incorporated.

With only one exception, there are no particular formalities required in order to create a day care center as a sole proprietorship. The one exception relates to the requirement that a "True Name Certificate" be filed if the person operating the center is operating it under any name other than the person's own name. For instance, if Jane Jones is operating a center she calls the Happy Times Child Center, a True Name Certificate would have to be filed or Ms. Jones would be in violation of state law (or local law in some states). (For details concerning True Name Certificates, see Chapter II.)

Partnerships

The partnership is the type of organizational form most oriented toward the needs of people who do not want the total responsibility involved in running a center as a sole proprietorship but who also do not want the complexities involved in running a center as a corporation. The law recognizes two different types of partnerships: general partnerships and limited partnerships.

General partnerships. A general partnership exists when two or more individuals associate together for the purpose of engaging in any business activity, including running a day care center, and their association is based on equal status for each partner. This premise of equality means that each partner:

- has an equal responsibility with regard to the center's debts or other obligations;
- has made equal contributions to the organization.

The contributions need only be equal in value; they do not need to be contributions of the same nature. Thus, one partner might contribute a certain number of hours per week of time but make no financial investment while another partner might supply the cash needed to start operations and a third partner might supply the furniture and equipment for the center.

It is important to realize that the equality among partners upon which a general partnership is based is a right but not an obligation. With regard to decisions, every partner has the right to participate in making the decisions about the center's policies, personnel, operations, etc., but is not required to do so and may freely give up the right thereby allowing the remaining partner(s) to make the decision alone. Similarly, each partner has the right to expect equality of contribution from the other partners, but that right does not need to be enforced if the partners are content with an "unequal" situation.

However, the opposite is true with regard to responsibility. There is an obligation of responsibility on the part of all partners. All partners are equally responsible for the debts and other obligations of the organization and this responsibility can be enforced by any third party; the partners cannot agree that one partner will bear no financial responsibility for the center. This legally-imposed equal responsibility is the core feature of a general partnership and should be kept very clearly in mind before deciding to operate a day care program through this mechanism.

Limited partnerships. Obviously, there are some people who would be interested in being part of a partnership running a day care center if there were a way of avoiding the obligation of responsibilty discussed above. There is a way of doing that to a certain extent. The method of accomplishing this goal is to create what is called in law a "limited partnership" rather than a general partnership.

In a limited partnership there must be at least one general partner (there may be any number more than one) and at least one limited partner (again there can be any number more than one).

The limited partner is "limited" with regard to the all important matter of financial responsibility. A limited partner is responsible for the debts and other obligations of the center only to the extent of the contribution of assets which the partner originally made. In other words, if Jane Jones is a limited partner in the Happy Times Child Center and her original contribution to the center was one thousand dollars in cash and five hundred dollars worth of furniture, the maximum amount for which she could ever be held liable in terms of the center's debts would be fifteen hundred dollars. For the general partners in the Happy Times Center, there is no limit to their responsibility; their personal financial liability for the debts of the center extends to whatever the debts would total (divided equally by the number of general partners, of course) even if this results in liability for an amount which is hundreds of times the value of their initial contribution.

In order to qualifiy for such limited liability, however, the limited partner must give up most of the rights which the general partners have. In particular, the limited partner has no voice in the daily decisions concerning the center and cannot participate actively even in major decisions unless they concern matters which have an important effect on the center's finances.

Limited partners are really investors who are treating the day care center as an investment. In return for contributing a certain amount of funds to get the center started, or to maintain it, they are entitled to a certain percentage of the center's profit--if and when it has any.

Thus, limited partners share neither the burdens of running a center nor the potential financial liabilities from its operation (other than to the amount of their contribution). Therefore, a typical reason why those who plan to be general partners would agree to form a limited partnership with one or more limited members, rather than a regular general partnership, is that they cannot make their day care center a reality without the limited partner's contribution in cash or in kind. An organizer may also choose this structure in order to retain control over the center rather than to share it with several partners.

Capacity to be a partner. Thus far our discussion of partnership has assumed that the partners, whether general or limited are human beings. This need not be the case, however. It is perfectly legal for a corporation to be one of the partners in a partnership; it is also legal for a sole proprietorship to be one of the partners in a partnership. And a partnership could be composed of a combination of a corporation, a sole proprietorship and a human being (who is called a "natural person" in the law). Thus, for instance, the Happy Valley Area Child Welfare League, Inc. (a corporation) and the Happy Times Child Center (a sole proprietorship run by Jane Jones), and David Drew, a "natural person" with some money to invest, might together form a partnership to run a center in addition to the one Ms. Jones is already running, or perhaps even a whole network of centers.

Corporations

While it may seem odd at first to think of an impersonal entity such as a corporation as an appropriate structure through which to run a day care center, in fact, in many situations a corporation is the most appropriate structure for operation of a day care center. The explanation for this conclusion lies in the many special advantages the law confers on people who conduct any sort of business through the corporate form. Those advantages will be detailed in the next section but, first, it is important to have some basic knowledge about corporations before being able to consider in an intelligent manner whether to incorporate your day care center. The most elemental piece of information is that corporations come in two categories:

- profit;
- not-for-profit.

Not-for-profit corporations may be either taxable or tax-exempt.

Profit or not-for-profit. An enormous amount of confusion has resulted from the tendency of people to use the phrase "nonprofit" in place of the proper legal phrase "not-for-profit". Use the of the phrase "nonprofit" has led people to reach what seems to them an obvious conclusion--the organization is not permitted to make a profit. This is not true. It is both permissible and indeed common for corporations organized as not-for-profit corporations to succeed at making a profit and, on the other hand, for corporations organized as profit-making corporations to fail to make a profit.

The essential differences between a profit corporation (for instance, General Electric) and a not-for-profit corporation (for instance, the Day Care and Child Development Council of America, Inc.) do not concern whether the corporation's income exceeds its expenses (i.e., whether a literal "profit" is made). The essential differences concern the purposes, powers and responsibilities for which the corporation is organized and operated. Thus the core issue is whether the center was organized for the purpose of being a profit-making endeavor and not whether, in fact, the center's income exceeded its expenses.

It is true that a day care center could not be organized as a not-for-profit corporation if the organizer's purpose in establishing the center in the first place was to run it as a profit-making business. But, if the center is organized on a not-for-profit basis, and it makes a surplus (has income in excess of expenses) some years, it doesn't need to "give back" the surplus which could be called its "profit". It can use that money to increase salaries, or purchase equipment, or hire additional staff, or have renovations done, or put it in a fund to be spent on similar purposes in future years.

The only legal restriction is that the money must be used in some way which furthers the purposes for which the center was created. (These purposes are outlined in the initial document you file in order to get incorporated). The profit cannot be paid out to the organizers, or other financial supporters, as dividends. So, a not-for-profit day care center can legally make a profit but it cannot pay that profit over to its organizers or others in the way a center incorporated as a profit corporation could. It can, however, reward paid staff for their efforts through using any profits to increase salaries.

Taxable v. tax-exempt. All corporations formed for profit-making purposes are automatically subject to taxation. Many people therefore assume that all organizations formed as not-for-profit corporations are automatically tax-exempt. This is not true. The organizers of a not-for-profit corporation must file an application for tax-exemption. They do not receive tax-exempt status automatically merely by virtue of being a not-for-profit corporation. Failure of a not-for-profit corporation to file for tax-exemption could potentially lead to a great deal of difficulty with the Internal Revenue Service (IRS) and with state tax authorities. A not-for-profit corporation which has not filed for tax-exemption or, having filed, has been denied an exemption is subject to taxation.

Another assumption which has been made by some operators of day care centers is that if an organization has received tax-exempt status from the IRS, it is automatically exempt from state taxes. This is not true in most states. Again, an application for exemption from state taxes must be filed with the appropriate state authorities. While in many states the application will be granted automatically if federal tax exemption has already been obtained, the day care center will not be exempt from state taxes until that application is granted.

CHOOSING AN ORGANIZATIONAL STRUCTURE: COMPARATIVE CHARACTERISTICS

There are many legal differences in the powers, duties, liabilities and other aspects of the forms of organization we have been considering (sole proprietorship, partnership and corporation). Of these differences, there are perhaps half a dozen major ones and it is these which should be the determining factors in deciding what legal form to choose for a day care center. These major differences in organizational characteristics involve:

- The extent of personal financial liability which could be imposed on the operators of the center;
- The nature of the decision-making processes which the center may use;
- The ease with which the original operators of the center may transfer it to others or change its basic form;
- The types of tax obligations which are incurred;
- The requirements regarding what happens when the center "goes out of business";
- The extent of the paperwork involved in creating and in operating the center.

The following discussion will summarize the rules regarding each of these points for each of the forms of organization.

Characteristics of Sole Proprietorships

In a day care center organized as a sole proprietorship, the owner (who is usually also the operator) has full personal liability for the financial consequences of all aspects of the center's operation. This includes liability for debts, for breaches of contract, for torts, for

taxes and tax penalties, for regulatory fees, etc. The liability is said to be "full" because it is not limited in amount; all the center's obligations must be met from the owner's personal funds (including the value of assets such as cars) no matter how large the obligation (including obligations in amounts which exceed the owner's total personal funds).

Although there is full liability, the sole proprietor also has full decision-making authority. There are no restrictions of any type about the decision-making process and the sole owner may do with the center whatever the owner wishes whenever the owner wishes and in whatever manner the owner wishes (consistent, of course, with any governmental licensing or other regulations generally applicable to day care centers).

A day care center run as a sole proprietorship has free and immediate transferability. The owner can sell the center at any time to anyone the owner wishes or give it away to another individual or to any organization or simply close it and go out of business.

The income from a sole proprietorship center is treated as the owner's personal income and therefore there are no non-individual tax obligations or forms to be filled out. The owner simply reports the income earned from the center on Form 1040 after filling out Schedule C (Profit or Loss from Business or Profession). It is on Schedule C that the owner will report the center's gross income and itemized expenses and whether these resulted in a net profit or loss for the year.

If the owner-operator of the center decides, for whatever reason, not to run the center any longer, there are no restrictions on going out of business. The owner may simply stop caring for the children and pay any outstanding debts of the center. Nothing else is involved. The legal life of a sole proprietorship organization ends whenever the sole proprietor says it does (subject, of course, to existing contractual obligations to parents and others and to regulatory requirements, such as prior notice to affected parties).

There is almost no paperwork involved in the creation of a sole proprietorship. Only one document is required to legally open a center as a sole proprietor and that one is needed only if the center is given a name other than the owner's name. (This document is the True Name Certificate referred to on page 13). There may, of course, be other documents required of all centers, no matter what their form, by licensing and other regulatory authorities.

Characteristics of Partnerships

In day care centers which are operated as partnerships, all general partners have full personal liability for financial obligations of the center to the same extent that they would have if they each were operating the center as sole proprietors. What distinguishes the general partnership from the sole proprietorship with regard to liability, however, is that each partner has the right to demand that every other partner share equally in any financial obligations. As indicated earlier in this Chapter, in a partnership where there are limited partners, the limited partners are personally liable only to the extent of their capital contribution. The capital contribution is the total value of whatever the limited partner contributed to the formation of the center whether the contribution was in the form of cash, furniture, equipment or other assets.

In a general partnership, each partner is co-equal in decision-making and, as a result, each partner has full authority to make binding decisions independently of the other partners. This means that any decision which any partner makes, for instance, to purchase a typewriter or to admit a child to the center or to order food from a grocery, is binding on the organization--and on the other partners personally--even if the other partners never knew the decision was made. This aspect of the law of partnership is one which is overlooked by many people thinking about operating a day care program as a partnership.

A partnership has only very limited transferability. A partner may sell or give away her or his interest in the partnership only if all the other partners consent to such a transfer. By law a partnership is automatically dissolved whenever one of the partners dies. A center operated by a partnership can legally operate after the death of one of the partners only if the surviving partners form a new partnership, or some other form of organization, to continue the activities. No change in basic organizational form, for instance from partnership to not-for-profit corporation, can be made without the consent of all the partners.

As with a sole proprietorship, people running a day care program through a partnership will have only individual tax obligations. Unlike a sole proprietorship, however, the partnership does have to file an informational return, called Form 1065, even though the income the partners receive from their day care program is taxed to them as individuals. There is no separate tax on partnerships.

By law, a partnership automatically goes out of business whenever a partner withdraws from the "business" or

dies or becomes permanently incapacitated or becomes insane. As indicated above, the surviving partners must form a new organization if they wish to continue their day care activities once one of these events occurs.

Depending on whether the partnership is a general one or a limited one, there will be only one or two documents required to operate a day care program in a partnership form. If a general partnership is the chosen form, only a True Name Certificate will have to be filed. If there are limited partners involved also, a Limited Partnership Certificate must be filed in addition to the True Name Certificate. Although no other documents are legally required in order to operate a day care partnership, it is desirable in most situations to prepare a Partnership Agreement. All of these documents are discussed in the next chapter.

Characteristics of Corporations

While partnerships and sole proprietorships have some important characteristics in common, corporations are quite different with regard to the major issues of concern to day care providers.

If a day care program is run by a corporation, no matter whether for profit or not-for-profit, the corporation will have a legal existence separate from that of any of the people who create or operate it. It is this separate entity, the corporation, which incurs any financial liability arising in the course of providing day care services, no matter whether the liability is in the form of ordinary debts or contract breaches or tort claims or tax penalties, etc. Consequently, there is, with only a few minor exceptions, no personal liability for anyone involved in the operation of a day care center through a corporation. This absence of any personal financial liability is the principal reason why people choose to form corporations rather than conduct their activities as sole proprietorships or partnerships. With regard to day care programs, which typically are run on a fairly small scale, this lack of liability feature will frequently be the most important element in the decision about which organizational form to choose.

The corporation will have a Board of Directors which is legally charged with the responsibliity for making all major decisions regarding the activities of the center. As indicated above, however, the members of the Board will not have any personal liability for those decisions or for any other actions, with only the following exceptions: Board members can be held personally liable for the failure of the corporation to pay withholding taxes on employees' salaries, for failure to pay state unemployment taxes in

some states, for fraud, and for gross negligence in their duties as Board members (where the negligence resulted in some financial loss to the organization).

In a day care program operated by a corporation, there must be a formal decision-making structure. All major financial and policy decisions, including such matters as the program's rules on admission of children, must be made by the Board of Directors or someone acting on general instructions from the Board. Normally, the Board will delegate considerable decision-making authority to a salaried chief operating officer with an appropriate title such as center director, executive director or president, but the Board remains responsible for that person's actions. This officer, in turn, will be empowered by the Board to further delegate some matters to staff members, for instance, to a head teacher regarding program questions and to a bookkeeper regarding fiscal questions. Although an executive director may run a day care program in fact, on a day-to-day basis, she or he has only those powers granted by the Board. Any major action which an executive director takes which is not based on advance instructions from the Board is binding (i.e., legally enforceable) on the organization only if the Board subsequently ratifies the director's action. (There are some exceptions to this general rule which are mentioned in Chapter VI: Liability and Board/Director/ Staff Legal Relationships.)

In a corporation, the issue of transferability is complicated to a greater extent than in the other organizational forms. If the corporation is organized for profit, there will be shareholders and those shareholders can transfer their interest in the organization (their shares) by sale or gift at any time they choose. Unlike the situation with partnerships, such transfer does not have any effect on the legal existence of the organization. A corporation exists as a legal entity forever unless it is formally dissolved by the Board of Directors or by a court.

If the corporation is organized on a not-for-profit basis, no one has any ownership interest in it to transfer. If the not-for-profit corporation has acquired tax-exemption, very strict rules govern the manner in which any of its assets can be transferred to another organization or to any individuals. Basically, individuals may not receive anything of substantial value from a tax-exempt organization except as payment for services rendered. And the organization may not pay over funds to any other organization except as payment for goods and services rendered or as a donation to some other tax-exempt organization. Transfers of decision-making responsibility are accomplished simply by electing new members to the Board of Directors.

Regardless of whether the individuals running an incorporated day care program are doing so on a taxable or a tax-exempt basis, they will have to file numerous tax forms in addition to their own individual income tax forms. There are several varieties of both annual and quarterly tax returns which must be filed. The forms on which this is done differ depending on whether or not the corporation is tax-exempt. The forms which an exempt day care center must file are discussed briefly in Chapter IV on Establishing the Program. The important point to remember is that you will be under the legal obligation to file these returns in an accurate and timely manner if you decide to incorporate your program rather than run it as a sole proprietorship or partnership.

When an organization is incorporated, its manner of going out of business is regulated by state law in a fairly strict way. Since there are many differences from state to state, it isn't possible to summarize them here. If the organization is also tax-exempt, the manner in which it goes out of business is also regulated by federal law and it is the federal regulation which is most important. The core of the federal rule is that when a tax-exempt organization goes out of business it must give away to some other tax-exempt organization(s) any assets it has left over after paying its debts. No assets can be kept by the staff, directors, or members of the organization.

Usually, this rule poses no problem because most tax-exempt organizations go out of business because their assets are inadequate to meet their debts. However, that is not always the case, and people considering incorporating a tax-exempt day care program should clearly understand that any assets the organization may have whenever they decide to terminate it are not "theirs"; they belong to the corporation and federal law requires the corporation to give them away to another tax-exempt organization.

In order to organize and then operate a day care program on an incorporated basis, a wide variety of documents are required. Some of these have to be prepared and filed only once while others must be prepared on an annual, quarterly or, occasionally, even more frequent basis. Among these documents are the articles of incorporation, the by-laws, minutes of Board of Directors' meetings, statements of financial condition and minutes of the annual meeting of members, all of which are discussed in Chapters II and III. When all these documents are added to those which are required by state licensing authorities and to those already mentioned relating to taxes, it should be apparent that operating an incorporated program can involve a very considerable amount of paperwork. This is the price the state exacts in return for giving you the freedom from personal liability which incorporation brings.

CHAPTER II

FORMING THE ORGANIZATION

SOLE PROPRIETORSHIPS

PARTNERSHIPS

- General Partnerships
- Limited Partnerships

CORPORATIONS

- Articles of Incorporation
- By-Laws
- Incorporator's Meeting
- Filing the Articles

Chapter II

FORMING THE ORGANIZATION

As the previous chapter has explained, it is important to give careful consideration to the type of organization which best suits the needs and plans of the individuals and groups who will be operating and using the day care center. The decision about type of organization is the initial decision from which all other legal-related decisions flow. It is the decision which determines the legal structure, as opposed to the organizational structure (staffing pattern) and physical structure (building), within which all the center's activities must take place.

This basic decision regarding type of organization should be made after thinking through the three major issues discussed in Chapter I: ease of operation, nature and extent of liability, and type of tax status.

Once the decision concerning the most appropriate type of organizational structure has been made, the next task is to take those steps which are required by law for the proper formation of the organization. These steps are set forth in state law, and, to a much lesser extent, local law. It is very important to follow these steps carefully and exactly because failure to do so can result later in numerous legal problems which may be the undoing of the program as well as the cause of very serious difficulties for the individuals who formed and operate the center.

The steps required to properly form two of the organizational types, sole proprietorships and partnerships, are exceptionally simple and can be done by anyone. The steps required to form a corporation are considerably more complicated, but nevertheless can often be done without an attorney. Where the decision is to create a tax-exempt corporation, however, consultation with an attorney is advisable because of the additional complexities created by the process of seeking tax exemption.

SOLE PROPRIETORSHIPS

The sole proprietorship is the simplest of all types of organization. In most states, a sole proprietorship is created simply by filing the True Name Certificate (referred to in the previous chapter) with a governmental

official who is usually a town or city clerk. (In some states this document is called a "Fictitious Name Registration".) The purpose of the True Name Certificate is to reveal (to creditors, to official authorities, to banks, etc.) who the owner of the business is.

The True Name Certificate requirement exists because many sole proprietorships, including most day care centers which are operated as sole proprietorships, are operated under a name other than that of the individual who actually owns the organization. For example, Jane Jones may be operating a small center which she calls the Happy Times Child Center. In this case, Ms. Jones is said to be "doing business as" the Happy Times Child Center. "Doing business as" is usually abbreviated to "d.b.a" by banks, insurance companies and businesses. Thus, for example, the official transactions involving written contracts will be between the bank or insurance company on the one hand and "Jane Jones d.b.a. Happy Times Child Care Center" on the other hand.

In many instances, however, Ms. Jones, will enter into transactions (such as purchasing supplies or ordering food or hiring a plumber) solely as the Happy Times Child Care Center without any further indication of who owns the center. The True Name Certificate requirement exists to provide such people and organizations a way of finding out who actually owns the center in the event any dispute arises (such as non-payment of a bill or injury on the premises).

The Certificate itself is very simple. Generally, it merely asks the name of the owner, the address of the business, the type of business and the address of the owner, if different from the address of the business.

In many states the Certificate will have to be notarized before it can be filed. This simply means that the owner must appear before a notary public, swear that the information in the Certificate is true and sign the Certificate in the presence of the notary.

When the Certificate is filed with the city or town clerk (or other official in some states) it must be accompanied by a small filing fee. Usually the notary public will also charge a small fee for notarizing the Certificate.

If the center is given the name of the owner, for instance, "Jane Jones Child Care Center", a True Name Certificate should still be filed just to be careful although it probably would not be required in many states. The filing of a True Name Certificate is technically not required if

the individual owner does not give any name to the center, other than that of the owner.

The filing of the True Name Certificate is the only legal requirement for the creation of a sole proprietorship. There are other steps, however, which must be taken shortly after creation of the sole proprietorship, if it is to be a properly and lawfully functioning organization. Since these steps are common to all the types of organization which day care centers might use, they are described in Chapter III on Establishing the Program. In addition to the steps described in that chapter, the proprietor must, of course, fulfill all requirements of the licensing agency before beginning to operate. These will be discussed in Chapter VII on Licensing Requirements.

PARTNERSHIPS

In the preceding chapter, the difference between partnerships with only general partners and partnerships which include limited partners were described and the implications of general partnership status versus limited partnership status were outlined. The process with regard to formation of a partnership differs depending on whether the organization is to be composed solely of general partners or is to include one or more limited partners.

General Partnerships

In order to form a general partnership, all that is required in most states is that a True Name Certificate (or "Fictitious Name Registration") be filed with the clerk of the city or town in which the day care center is going to be located. As with the sole proprietorship True Name Certificate discussed above, the partnership True Name Certificate usually must be notarized before it is filed in the clerk's office. It asks for the same information--owner's name and address, location of the center if not at the owner's address, etc.--as was described above. The filing fee which must accompany the Certificate is usually the same as the fee for sole proprietorships.

Thus, if Jane Jones and David Drew wish to run the Happy Time Child Center as co-owners with equal responsibility for the organization, they merely file the True Name Certificate and take the other steps described in Chapter III on Establishing the Program and they will have fulfilled all the legal requirements for the creation of the center as a general partnership.

However, the co-owners would be well-advised to take an additional step and prepare what is called a Partnership Agreement. A Partnership Agreement is a document which describes all the facts concerning the way the co-owners intend to establish, operate and, if necessary, terminate the organization. The preparation of such an Agreement is highly advisable because it forces the co-owners to think through their answers to a number of important questions at the very outset of their endeavor.

The typical Partnership Agreement will state what the partners have decided with respect to such issues as:

- How the profits (or losses) will be distributed;
- How much capital and in what form (cash, furniture, etc.) each partner is contributing;
- Who will be responsible for daily management of the center;
- How major decisions will be made (unanimous vote, majority vote, etc.);
- Whether the books will be kept on a cash or accrual basis and on a calendar or fiscal year;
- The manner in which an interest in the partnership may be sold or transferred.

It is advisable to decide these and similar issues at the very beginning for three reasons. First, it is always better to think through such concerns when there is time for full discussion, reflection and reconsideration rather than making decisions hurriedly under pressure. Second, even partners who know each other well in non-business situations have a way of seeing issues from different perspectives; therefore, it is unwise to assume your partner will reach the same conclusion you would on some undiscussed issue. And third, even partners who are the best of friends may forget what was agreed to long ago, or may change their minds once the situation has soured for some reason.

It should be remembered, of course, that although the True Name Certificate is all that is required in order to form the partnership, the partners must still comply with all the other legal requirements regarding licenses, permits, etc., in order to be entitled to run the day care center. Most of these requirements are discussed in subsequent chapters.

- The right, if agreed upon, of partners to receive property or services other than cash (such as free day care) as compensation;

- The period of time during which the partnership will exist;

- The circumstances under which additional partners can join the partnership;

- The order of priority, if any, in which partners will be compensated.

And, of course, the form also requires the full name and residence of each partner, the location of the business (the day care center), the name of the partnership, etc.

Many of the issues which must be resolved in order to file the Limited Partnership Certificate are also issues which are usually addressed in the Partnership Agreement discussed earlier. Therefore, any group of people who are considering operating a day care center through the limited partnership form of organization would be well advised to prepare a Partnership Agreement for themselves first and then simply fill out the Limited Partnership Certificate on the basis of the information contained in their agreement.

As with general partnerships there is no requirement that there be a Partnership Agreement in order for the partnership to legally exist. Nevertheless, the reasons for having a Partnership Agreement apply with even more force to a limited partnership than a general partnership because of the extra complexity caused by having partners with differing degrees of commitment and responsibility.

CORPORATIONS

The formation of a corporation for the purpose of running a day care program may be simple or complicated, depending on the state in which the corporation is formed. The procedures through which corporations are formed are determined entirely by state law, and the state procedures vary considerably in complexity. In most states, the formation of a day care corporation is relatively simple.

In every state there are certain procedural rules which differ depending on whether the day care program you are incorporating is going to be run on a not-for-profit or a profit basis. In most states, this profit/not-for-profit distinction is the basis for four differences: (1) Profit

organizations and not-for-profit organizations are created by filling out different official forms and by filing those forms with different state offices, (2) the profit forms will require you to answer questions about stock and stockholders, while the not-for-profit forms will inquire about "members" of the organization and their rights, (3) if you are incorporating on a not-for-profit basis, you must carefully limit the statement of organizational purposes and powers in ways that satisfy the concerns of the Internal Revenue Service (if you intend to seek tax exemption), and (4) usually the filing fee for creating a profit corporation is much greater than for a not-for-profit corporation, frequently as much as five times greater.

It is beyond the scope of this Handbook to explain in detail the differences from state to state in the process of forming a corporation. What this section will do is to summarize the matters which are common to almost every state's requirements. In a large number of states, these will be the only requirements; in a few there will be many others as well, but those listed here should be the core of the process.

Basically, there are four major steps involved in the incorporation of a day care program:

- Preparation of articles of incorporation;
- Preparation of by-laws;
- Conduct of initial incorporator's meeting;
- Filing of articles and other documents.

In some states, by-laws are not required for incorporation. However, they are always required by the IRS as a pre-condition to tax exemption even if the state doesn't require them for incorporation.

If you are creating a not-for-profit organization, once these steps are completed and you have received official confirmation of corporate status, you may file an application for tax-exemption. But, since the process of getting a tax-exemption is completely separate from the process of getting incorporated, it will not be discussed here.

Articles of Incorporation

Every state requires the preparation of articles of incorporation (sometimes called the certificate of incorporation, charter or articles of organization) as a principal step in the incorporation process. In most states, it is

the first step. Each state issues, usually free, an official form for an organization's articles of incorporation, and this form is usually obtained from the same state office where it is filed after being filled out (usually the Secretary of State's Office or Department of Corporations). The form will contain a number of questions which must be answered by the "incorporator(s)", which is the name given to the person(s) who sign the form and thus are the organization's legal creators. (See page 27 regarding incorporators.)

The questions on the articles form primarily concern three matters: the purposes for which the organization is being formed, the powers which the organization will have, and the members of the organization. It is best to state the purpose of the organization, simply and briefly. If the day care program is to be tax-exempt, and not-for-profit incorporation articles are being filed for this reason, it is very important to write the purpose statement in language which is acceptable to the Internal Revenue Service for classification as an "educational" or "charitable" organization. To be safe, it is usually a good idea to include a sentence restricting the organizations' purposes "to those permitted under section 501(c)(3) of the Internal Revenue Code of 1954 or its successor sections in subsequent revenue codes". (The IRS will provide a free pamphlet on obtaining tax-exemption.)

With regard to the powers of the organization questions, a day care program being incorporated on a profit basis will want to claim all powers normally granted to corporations under state law. This can be accomplished either by a simple sentence making such a claim or, to be more cautious, actually listing all the powers (purchase property, make and receive loans, form pension plans, etc.). The list can probably be obtained from the same office where the articles form is obtained. For a program being incorporated on a not-for-profit basis and intended to be tax-exempt, certain powers normally granted to corporations may not be claimed because they would render the organization ineligible for tax-exemption. This problem can be dealt with in two ways: (1) by simply claiming "all those powers permitted to be exercised by not-for-profit corporations in (your state) which are also permitted to be exercised by organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1954 or its successor sections in subsequent revenue codes". (2) The alternative is to list specifically all the powers normally available and then follow the list with a statement restricting the organization to the use of those powers permitted under section 501(c)(3).

With regard to members of the organization (in a not-for-profit center) or shareholders (in a profit center), the questions usually relate to the rights and duties of these individuals. Some states have abolished outright the requirement that not-for-profit corporations have members and most states permit the people who serve on the Board of Directors to be the members (they simply "switch hats" at meetings depending on the kind of action they are taking). To avoid unnecessary complexities and additional paperwork, it may be desirable to avoid having members in states where that is permissible. The additional paperwork is created by the fact that the members and the Directors are required to hold separate meetings, maintain separate records, file separate reports with state agencies, etc. On the other hand, in some situations, there may be reasons internal to your group why it is desirable to have both members and a Board of Directors; this will most often be the case where a large number of people are involved in the day care program, as for example in a parent corporation. Typically, in such a situation, the Board of Directors will take greater responsibility for financial matters and regulatory agency issues while the members, who usually are all parents, are more concerned with policy regarding curriculum and related quality of care issues. Often, the Directors report to the members on all matters.

The articles form will also inquire about a number of other less complicated matters including the names of the initial Board of Directors, the names of the initial officers, the date selected for the annual meeting, and the date selected for the end of the fiscal year.

By-Laws

In most states, formal by-laws must be prepared as part of the incorporation process. In those few states where they are not required, it is still advisable to prepare them because the by-laws constitute the basic rules under which the organization will conduct its affairs and set out the manner in which orderly decision-making will take place and by which power can by smoothly transfered. Essentially, an organization's by-laws are its rules for determining four things: (1) who has the power; (2) to make which kinds of decisions; and (3) when these decisions can be made; and (4) how or in what manner they must be made.

Usually, the state simply requires that an organization have by-laws; it doesn't prescribe what can go in them. In a limited sense it does control the content of the by-laws, however, by prohibiting them from containing anything contrary to the contents of the articles of incorporation. In addition, the Internal Revenue Service will review

the by-laws of any organization which applies for tax-exemption. Therefore, any day care program intending to be tax-exempt must be careful not to put matters in the by-laws (additional organizational purposes and powers, for instance) which might jeopardize eligibility for tax-exemption. With these two exceptions, the incorporators are generally free to put whatever they like in the by-laws.

Incorporators' Meeting

Every state requires that the articles of incorporation be signed by an incorporator and some states require several, usually three, incorporators. In most states, any person who is over the age of majority may act as an incorporator; in some states, however, restrictions are placed on whether persons with criminal records may act as incorporators of not-for-profit organizations.

It is the duty of the incorporators to take all the official actions required to bring the corporation into legal existence. These actions include preparation of the articles of incorporation, preparation of the by-laws, and a series of acts which are to be taken at what is called the initial meeting of incorporators (which is usually the only meeting they are legally required to hold). At the initial meeting, the incorporators must, by formal vote, take the following actions: (1) adopt the name of the corporation; (2) approve the articles of incorporation; (3) approve the by-laws; (4) elect the initial officers and Board of Directors (who will serve only until the first meeting of members); (5) authorize the issuance of stock, if the corporation is organized for profit; and (6) vote to file the articles of incorporation with the appropriate state office. Formal "minutes" of these actions should also be taken. These "minutes" can simply be a piece of paper on which all the votes taken at the meeting are listed, together with the names of those who voted (the incorporators). The minutes should be dated and signed by each incorporator.

Once the state approves incorporation and a corporate charter is issued, the incorporators go out of existence. The persons who served as incorporators no longer have any duties, responsibilities or powers regarding the organization. From the moment of approval onward, all authority in the organization lies with its members, if it has any, and with its Board of Directors.

Filing the Articles

In most states, the articles of incorporation are filed with the same state office from which the blank articles

form was obtained. "Filing", in most cases, simply means taking the document to the office and handing it over to a clerk, together with a check in the amount of the filing fee. In a few states, the articles must be approved by a local court before they can be filed.

Usually, the incorporator will be required to file the by-laws along with the articles of incorporation and often will also be required to file the "minutes" of the initial meeting of incorporators as well.

A check for the "filing fee" must accompany these documents. Once the documents are filed and the fee paid, you simply wait for the written notice that they have been approved and the charter has been issued. The length of this wait varies greatly from state to state, and can take anywhere from ten days to six months.

CHAPTER III

ESTABLISHING THE PROGRAM: FORMAL LEGAL REQUIREMENTS

EMPLOYER IDENTIFICATION NUMBER

STATE UNEMPLOYMENT INSURANCE

SOCIAL SECURITY

WITHHOLDING EXEMPTION CERTIFICATES

PERIODIC TAX RETURNS

ANNUAL TAX RETURNS

ANNUAL STATE REPORTS

Chapter III

ESTABLISHING THE PROGRAM: FORMAL LEGAL REQUIREMENTS

Since the operation of a day care program is legally the operation of a business, there are a number of legal requirements applicable to all businesses which you must fulfill in order to operate your program in a lawful manner. There are also legal requirements regarding such matters as licensing and permits which are discussed in Chapter VII: "Licensing Requirements".

EMPLOYER IDENTIFICATION NUMBER

Every organization, no matter how small, which employs people on a regular salaried basis is required to obtain a federal Employer Identification Number. This includes all forms of organizations--sole proprietors, partnerships and corporations. In addition, a not-for-profit corporation is required to obtain an Employer Identification Number even if it doesn't have any employees. Without one, it cannot file an application for tax exemption or file the required annual information returns. Thus, if you plan to operate your day care program as a not-for-profit corporation but don't plan to actually begin running the program until some time after receiving official notice of incorporation, you must still acquire the number.

An Employer Identification Number is acquired by filing an application with the Internal Revenue Service on the appropriate form. This form may be obtained from any local IRS office, the addresses of which are listed in the telephone book under the heading "United States Government". The form is very short, about the size of two postcards, and asks about a dozen questions, such as the address of the organization, types of activities it engages in, etc. The form can be filed by mail. There is no fee.

STATE UNEMPLOYMENT INSURANCE

As soon as an organization with any employees begins operations, it is required by most states to register with the state unemployment insurance office, which is usually called something like the Department of Employment Security or Department of Unemployment Compensation. Registration is usually accomplished by filling out, and returning

by mail, a questionnaire about your activities, your employees and your organization's tax status.

If you are running a day care program as a not-for-profit corporation, you will have, in most states, an option to choose between two alternative methods of participating in the unemployment compensation system. These two alternatives can be called the "actual costs" method and the "contributions" method. Under the actual costs method, you do not pay any unemployment tax or make any other payment until a former employee goes on unemployment. Once a former employee begins collecting unemployment compensation, your organization is then obligated to pay the state unemployment office the actual cost of the amount of benefits which it has paid out to the employee. If no former employee ever goes on unemployment, you never have to pay anything. An employer which chooses the actual costs method is, in effect, a self-insurer.

Under the contributions method, you regularly pay the state's unemployment tax for employers at the reduced rate established for not-for-profit corporations. This rate is based on the total amount of wages you pay and in most places, is not more than a small percentage of total wages. Under this system, you make regular tax payments, usually quarterly, at the established percentage rate regardless of whether any former employees have received unemployment compensation. Your payments under the contributions method are similar to premiums for an insurance policy in that the state pays all unemployment compensation claims of your former employees, and your liability is limited to your periodic payments to the system.

In most situations, the contributions method will be cheaper in the long run if you expect to be in existence for a while and anticipate that from time to time former employees will go on unemployment. If you expect to be in existence for only a short time or if, for some reason, you feel confident that no former employee will leave your program and go on unemployment, the actual costs method will be cheaper since its costs are zero if no claims are ever made.

Laws relating to unemployment compensation will be further discussed in Chapter IX, "Personnel Law: Wages, Benefits and Working Conditions".

SOCIAL SECURITY

Any for-profit day care program which has regularly salaried employees is required to participate in the Social

Security system through payment of the Federal Insurance Contributions Act (FICA) tax. The FICA tax is paid partially by the employer and partially by the employee with each "contributing" equal amounts. The amount of the tax changes frequently (always upward), but is always a percentage of a certain maximum amount of the employee's salary. The employee's "contributions" are made through payroll deductions while the employer deposits quarterly those deductions plus an equivalent amount from the employer's own funds.

A not-for-profit tax-exempt center may choose whether or not to participate under FICA. If it does contribute for three quarters, however, the IRS will treat it as having elected to participate and it will from then on be required to continue.

WITHHOLDING EXEMPTION CERTIFICATES

Every organization which has employees is required to obtain each employee's signature on a withholding exemption certificate. These certificates are the basis for determining how much to withhold from each employee's paycheck for federal, state and city (if any) income taxes. Each new employee should fill out the form, indicating marital status and number of dependents, before receiving the first paycheck. Whenever marital status or number of dependents changes or whenever, for personal reasons, the employee wants a larger amount to be withheld from each paycheck, a new form should be filled out and signed. The forms are obtained from the Internal Revenue Service and, once filled out, should be kept with the day care program's offical financial records.

PERIODIC TAX RETURNS

Employers are required to file quarterly federal tax returns on a quarterly basis each year. The return is filed by mailing it to the Regional IRS Service Center whose address will be listed on the instructions which accompany the return. If the return is not filed on time, IRS will assess a penalty.

ANNUAL TAX RETURNS

Every organization is required to file an annual federal tax return regardless of whether it made a "profit" or not, or is tax-exempt or not. This is true even if the organization was not actually operating during the year, so long as it was legally in existence during the year.

A day care program which is operated as a tax-exempt corporation will be required to file the "Return of Organization Exempt From Taxation". This return must be filed within a specific time after the end of the program's fiscal year.

For a day care program operated as a partnership, the partners must file a partnership return each year. For a day care program operated as a sole proprietorship, the person operating the program must file Schedule C - Form 1040 by April 15 each year.

All programs, no matter what their organizational type, are required to file Form 1099 each year if, in the course of the year, the program paid more than $600 in fees or any other compensation to any individual who was not an employee (for instance, an accountant or a plumber). The purpose of this form is to report to IRS that you paid fees to someone without withholding any taxes. This form comes in triplicate; the day care program keeps Copy C, Copy B goes to the person who received the money, and Copy A goes to the IRS.

ANNUAL STATE REPORTS

If the day care program is a not-for-profit corporation, it will, in most states, be subject to several requirements concerning annual reports to state agencies. Almost every state requires an annual financial report. Usually, this report is filed with the same state agency which processes articles of incorporation. Often, there is a penalty, which may even involve revocation of corporate status, for failure to file the report. In some states, the report must be signed by an independent auditor if the program had income over a certain amount during the year.

Many states require the filing of an annual informational report, usually in addition to the financial report. The informational report requires you to indicate the names and addresses of current members of the Board of Directors, names and addresses of current officers, sources of organizational income, etc. In states which require both informational and financial reports, they are usually filed with different state agencies and frequently are due on different dates.

CHAPTER IV

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Chapter IV

ESTABLISHING THE PROGRAM II: BASIC MANAGEMENT CONSIDERATIONS

There are a number of actions which every provider of day care services should consider taking at the very beginning of operations even though in most instances there is no legal requirement that these actions be taken. These actions are recommended either because they help structure the organizational affairs of the program in a sensible manner, or because they help protect against potential sources of liability, or for both reasons.

SEPARATE BANK ACCOUNT

A "separate" bank account means one which is not the personal account of the individual operator or operators. With the possible exception of the very smallest sole proprietorship efforts, every day care program operator should open a separate bank account in the program's name as soon as funds are available to open it. In most cases, this should be before the program starts receiving fees for services.

A separate bank account is legally required for incorporated centers. It is not required for programs operated as sole proprietorships or, in most states, as partnerships--but it is highly advisable. The principal reason for a separate bank account is to protect the operator(s) in the event any questions of financial irregularities are ever raised by anyone. A second, and in many cases equally important, reason is that some funding sources insist on a separate account as a condition of providing funds. It is always wise to maintain a separate account when receiving funds from a governmental agency, even if the agency doesn't actually require it.

For an incorporated program, a separate account is opened by having the Board of Directors vote to approve a "banking resolution". A pre-printed form for this resolution can be obtained free from most banks. In many states, a partnership must also open an account with a banking resolution signed by each partner. A sole proprietor simply opens an account the way she or he would as an individual, but opens it in the program name rather than her/his own name.

The banking resolution will indicate who is authorized to write checks or otherwise withdraw money from the program's account. Many incorporated programs take the precaution of requiring that all checks carry two signatures: one from an employee (usually the director) and one from a Board member or officer. The people who are named will be asked by the bank to sign several signature cards on which they indicate their title (such as Executive Director or President), home address, etc. The bank will honor checks and other items only if signed by authorized people, and will continue to honor them until given notice in writing not to. Usually, this notice is accomplished by filing new signature cards without the name of the person who is no longer authorized. For an incorporated program, a new banking resolution must also be filed. Until these steps are taken, a person originally authorized is still legally permitted to sign checks, even if the person has been fired from the program's staff.

PERSONNEL POLICY STATEMENT

In any program with more than three or four employees, it is desirable to develop a written personnel policy statement. Such a statement is often requested by funding sources, both governmental and private, and in larger programs, is almost always requested by auditors. There appears to be a trend toward requests for it by licensing authorities as well. Whether or not it is required, it is very useful in the smooth operation of a large program if all the people working in it are informed at the outset what the basic rights and expectations are with regard to matters like paid holidays, vacation accrual, sick pay, salary advances, changes in working hours and similar matters.

The personnel policy doesn't need to be elaborate or attempt to cover every conceivable detail. It is much more important that it be clear and that the rules it sets out be fair. It is perfectly appropriate for a relatively large amount of discretion to be granted to the executive director but, on the other hand, not everything should be left to the decision of the director on a case-by-case basis as this is guaranteed to result in difficulties. One typical approach is to set out a few basic principles according to which the director will make decisions.

Particularly in larger programs, it is important that the personnel policy statement indicate who on the program staff has access to which kinds of records. This is important for reasons of confidentiality and to guard against invasion of privacy.

These matters will be further discussed in Chapters IX and XV.

AUDITORS

An auditor is a certified public accountant (C.P.A.) who reviews the books and all other financial records of an organization at the end of the year and prepares "financial sheets" summarizing the income and expenses of the organization and then "certifies" in an "accountant's report" that everything is in proper order. (Or declines to do so if everything isn't!) The review process which the C.P.A. goes through is called "the audit". The audit is conducted at the end of the fiscal year which may or may not be the calendar year (you pick the date). Most organizations end their fiscal year on June 30, although some have switched to September 30 because this is the Federal fiscal year.

The auditor is a person, or more often a firm, whom you hire solely for the purpose of conducting an annual audit. Your staff bookkeeper, or accountant if you have one, cannot perform the audit. This is because audits are required to be "independent" and a center staff member is obviously not independent of the program.

In most states, not-for-profit corporations are required to have a certified independent audit conducted annually if their income is above a certain level. This income level varies from state to state. Since, in most states, almost all incorporated day care programs take in more than the minimum level of income (income, not profit) in the course of a year, most programs are subject to the audit requirement. Sole proprietorships and partnerships are not required by law to have annual independent audits, but they may be required by funding sources to submit audited financial statements. Where sizeable amounts of money are involved, it is always wise to have audits performed, even if there is no requirement that one be done.

It is advantageous to hire auditors long in advance of the time the audit is to be done. This will enable the auditor to consult early in the year with your bookkeeper about how financial matters are handled. There are two advantages to this practice. First, potential problems can be ironed out early which will save you money since auditors bill at fairly high hourly and daily rates. Second, by consulting in advance with the bookkeeper about how various matters should be handled, the auditor indirectly gets committed, in an informal way, to approving your bookkeeping system and thereby you avoid receiving any negative comments in the final audit report.

After you have spoken with several C.P.A.'s or C.P.A. firms about conducting the audit and you have selected the one you want, you should ask for an "engagement letter". This letter, which constitutes a contract between your program and the auditor, is a document in which the auditors describe exactly what they will do, when they will do it, what their fee will be, and what, if anything, they want you to do to prepare for the audit. Be careful to ensure that the cost of printing the audit report is included in the fee. Many a small program has negotiated what it considered to be an acceptable fee only to discover, after the audit was completed, that the printing fee of several hundred dollars wasn't included.

INSURANCE

Because of the importance of insurance, it is discussed separately in the next chapter.

CONTRACTS FILE

Contracts are discussed separately in the next chapter, but it should be pointed out here that a day care program of any size should adopt the practice of maintaining a contracts file. This is a file kept separate from the other organizational and financial records of the program and which contains the original of every current contract entered into by the program. It should also include brief summaries of any current agreements which the program has entered into without any written contract document being involved. Every variety of contract including those for supplies, food, staff employment contracts, leases, etc., should be kept in this file. If you use a purchase order system for items such as food, copies of the purchase orders should be kept in the file.

There are three reasons why the maintenance of a contract file is desirable. First, it makes it more likely that no important obligation will be forgotten or that the documents involving it be lost. Second, it makes your preparation for the annual audit or for any other type of financial review of your program much easier. And, third, it facilitates smooth transitions when personnel changes take place. It is the surest way of guarding against the confusion and unnecessary problems often caused by the departure of a bookkeeper or executive director on short notice.

INDEMNIFICATION

Indemnification is the legal word for protecting someone against having to bear personally the financial consequences of some potential liability. The principal method of achieving such protection is through the purchase of insurance.

For officers and members of the Board of Directors of a day care program organized as a not-for-profit corporation, insurance is not generally available.

It is possible, however, to protect these individuals from having to pay from their personal funds for some wrong done by the day care center. This is accomplished by having the Board of Directors formally vote an indemnification resolution, which in some states would have to be approved at the "Annual Meeting of Members". The indemnification resolution should be phrased in some way similar to the following: "No officer or director will ever have to pay any money as a consequence of any action or inaction of the organization unless the action or inaction was a direct result of gross negligence of duty on the part of the officer or director, and if any officer or director is ever held liable for any payment for any reason not involving gross negligence, such payment will be made from the funds of the organization, either directly or as reimbursement to the officer or director."

TAX EXEMPTION

Tax exemption does not "come automatically" along with not-for-profit corporation status, and a day care program organized as a not-for-profit corporation is not required to file an application for federal tax exemption. However, it is often very advantageous for an incorporated not-for-profit program to seek tax-exempt status.

Advantages and Disadvantages of Tax-Exemption

While "tax-exemption" sounds like something which is always desirable, it is useful to know precisely what its various advantages--and several disadvantages--are before plunging into an effort to make a center tax-exempt. The most important advantages of securing tax-exemption have been referred to in the last few pages but a list of all the principal advantages would include:

No federal or state income taxes have to be paid by the corporation;

- No state sales taxes have to be paid;

- Contributions to the center are tax-deductible, which encourages foundations and individuals to make contributions;

- The likelihood of being successful at getting grant funds is increased;

- The center's employees can choose (not individually) not to pay Social Security (FICA) taxes;

- The Federal Unemployment Tax does not have to be paid;

- State unemployment taxes do not have to be paid, in most states, so long as no employee makes a claim;

- The center can use space in a church, community center or any other tax-exempt organization without jeopardizing that organization's exempt status;

- The center will be eligible for the lowest postage rates;

- Much of the paperwork involved in a corporation which is not tax-exempt is avoided.

However, tax exemption has some disadvantages as well. The principal disadvantages include:

- More time and expense will be taken up by the initial activities and paperwork required to establish the center than if it were operated in any other manner;

- Annual audits of the center's books and other financial records will probably be required;

- The auditors who make annual reviews of the center's books will tend to be more strict;

- The center will be subject to the scrutiny of a number of state regulatory agencies merely because of its tax exemption;

- If the center goes out of business, any of its assets remaining after payment of debts

will have to be given away to some other tax-exempt organization--the center organizers will not be able to keep the assets or any proceeds from the sale of assets.

If the center wishes to be politically active, its right to lobby is somewhat restricted.

Categories of Exemption

The United States Internal Revenue Code contains over a dozen categories of tax-exempt organizations. Day care centers are eligible for exemption under two of those categories. The categories are usually referred to by the numbered sections of the Revenue Code in which they appear; the two sections under which day care centers are eligible are 501(c) (3) and 501(c) (4). Organizations which apply for exemption under section 501(c) (4) are called "social welfare organizations". Organizations which apply under section 501(c) (3) must be "charitable, educational, literary, religious or scientific". A day care center applying under 501(c) (3) would claim to be educational or charitable or both depending on the facts about the particular center's clientele and sources of income.

Until recently, it has usually been easier usually for a center applying under 501(c) (3) to be successful with its application if it applied under the "charitable" heading rather than the "educational" one. There are some indications that this is changing, but there is no nationwide uniformity since the decision to grant the application is generally made in the local district office of IRS.

There are several major differences between what an organization which is exempt under 501(c) (3) can do compared to one which is exempt under 501(c) (4). Only one of these differences is of any real concern to day care centers and that one can be of considerable importance. Contributions (whether made by an individual or an organization) to the day care center are tax-deductible by the contributor if the center is classified as 501(c) (3) and they are not deductible if the center is classified as 501(c) (4). Exemption under 501(c) (3) is clearly preferable for a day care center. A center should apply for 501(c) (4) status only if it is unsuccessful, after initial application and appeal, at getting 501(c) (3) status.

Source of Exempt Status

The United States Internal Revenue Service District Office is the agency to which a center must apply for

a federal tax-exemption. If the District Office refuses to grant the exemption, the center can appeal to the IRS National Office, Exempt Organizations Branch, in Washington, D.C.

In most states, the state government will have a Department of Corporations or Department of Taxation or similarly named agency to which application for exemption from state taxes is made. In some states, the application is filed with the office of the Secretary of State.

In some states it may be necessary to file two different applications, one for exemption from income taxes and another for exemption from state sales taxes. Many operating day care centers have been unaware that they are eligible for exemption from state sales taxes and have been unnecessarily paying sales taxes on everything they buy, from crayons to chairs to buses.

Once a state sales tax exemption has been granted, a certificate will be issued to the center containing an "Exempt Purchaser Number". Thereafter, employees purchasing things for the center need only supply the seller with that number and no sales tax will be charged. (Some states have a requirement that the seller be shown a copy of the certificate but this isn't often enforced.)

The application for federal exemption should be filed before the application for state exemption. In many states no action will be taken on the state application until the federal application has been granted. The federal application will not be acted on until after the center has filed its original incorporation papers. In most states these papers are filed with a state agency such as the Secretary of State's Office; in a few, it is done in the local court; in several, filings must be made both in court and in an agency. Thus, the normal process for forming a day care center as a not-for-profit tax-exempt corporation has three steps in this order:

1. File articles of incorporation with appropriate state authority.

2. File application for federal tax exemption with Internal Revenue Service District Office.

3. File application for exemption from state sales tax and income tax, if separate applications are needed, with appropriate state authority.

A filing fee will be charged when the articles of incorporation are submitted. The fee varies from state to state. There is no fee for filing the federal exemption application. Some states charge fees for filing the state tax exemption and others do not; the fees are usually small.

Period of Exemption

It will take anywhere from two to six months, depending on the area of the country, between the time the center's application is filed with the Internal Revenue Service and the time IRS notifies you about whether the application has been granted or denied. IRS calls this notification process the issuance of a "determination letter".

If the determination letter states that the center's application has been granted ("allowed" in IRS language), it will also state the date as of which the exemption is effective. Under the "rule of relation back", the determination letter will normally indicate that the effective date is the date on which the corporation was officially organized.

"Sister Organizations"

It is possible for a day care center, or a network of centers, to be operated through more than one corporation or other legal organization simultaneously. In the case of large centers or groups of centers this possibility can have some attractive aspects.

For example, it is possible for a center to be operated through a combination of a not-for-profit, tax-exempt corporation and a profit, taxable corporation. The second could be a subsidiary of or a "sister organization" to the first. A situation where it might be desirable to do this would be where the center's original basic organization, which was not-for-profit and tax-exempt, was precluded by the terms of its grants and contracts from purchasing certain items, for example, office equipment and furniture and was only permitted to rent such items. (This is a typical provision of many grants.) Rather than rent the items from merchants, thereby incurring over time larger costs than purchase would entail, the center could form a subsidiary profit corporation which could purchase the needed items and it could then rent them to the center. In addition to the obvious financial advantages of such an arrangement, it also has the spin-off effect of enhancing community organization through building self-sustaining, community-run businesses.

The possible combinations of and implications of running day care centers and networks through such multiple-organization structures are too complex to be treated in this Handbook, but organizers of centers which are either reasonably large or are operated under various grant restrictions should certainly consider these options.

CHAPTER V

ESTABLISHING THE PROGRAM III: INSURANCE AND CONTRACTS

INSURANCE POLICIES

- Liability Insurance
- Automobile Insurance
- Workmen's Compensation
- Fire and Theft Insurance
- Fidelity Bonds
- Health Insurance

CONTRACTS

Chapter V

ESTABLISHING THE PROGRAM III: INSURANCE AND CONTRACTS

Insurance and contracts seem to be troublesome areas for day care programs. The need for adequate insurance is too often overlooked. An insurance policy is actually just a contract--between you or your program and the insurance company--but since it is a very special kind of contract and possibly the most important contract a program will enter into, we'll deal with it separately from other contracts.

INSURANCE POLICIES

When thinking about insurance there are two principal things to focus on:

- Degree of potential risk;
- Amount of potential loss.

"Degree of potential risk" means the likelihood of some event happening, such as a child falling off a swing. "Amount of potential loss" means the amount of financial liability which you might incur if that event did happen. The determination of whether you need a particular kind of insurance, and, if so, how much you need, should be made by considering these two factors together. For instance, you should think about the likelihood of a particular class of risks, such as children being accidentally injured on the program's premises, and the amounts of money you might be required to pay as a result of those risks occurring, such as doctor's bills, hospital bills, etc., in considering how much insurance to purchase.

Where the likelihood of risk is high and the potential financial consequences are also high, the need for a substantial amount of insurance is obvious. But where the risk is relatively low and the financial consequences relatively small (an example in many areas might be thefts), it might be reasonable to conclude that insurance coverage is not necessary, given an already strained budget.

The most difficult decisions involve situations where, after considering both the potential risks and the potential loss, you conclude that one of these factors is quite high and the other quite small. A reasonably cautious

center operator might forego insurance where the risk is high but the loss is low, but purchase insurance where the potential loss is high even though the risk is low. This approach makes financial sense if your assessment of the two factors is accurate and if your program could afford the costs of relatively small liabilities. Ultimately, the determination in these situations rests on two issues: first, how much of a hardship would it be to pay the insurance premiums (fees) and, second, what is the likelihood that, in the long run, the insurance premiums would cost you more than paying directly for the consequences of the loss.

The act of buying insurance really involves a trade-off: you are swapping what you consider to be a large uncertainty (the degree of risk plus size of loss) for a certainty which you expect to be smaller (the premium). Taking advantage of "deductibles" (where for a lower premium you can insure a risk with the agreement that you will pay some amount of any loss covered by the policy) is one way of gaining broader coverage and reducing the number of these trade-offs.

There is one major alternative to insurance as a method of protecting yourself, which is to transfer the risk, and therefore the liability, to someone else. Some common examples of this method would be to run the program in a leased building rather than in one you own, to purchase services such as janitorial work under a contract rather than hiring an employee to perform them, to lease vehicles in which children are transported rather than buying them or reimbursing employees for use of their own vehicles.

This method of thinking about insurance should be used with regard to each of the major categories of insurance except in those limited instances where you are required, either by a licensing authority, a state law, or a funding source, to carry a specified amount of a certain type of insurance.

Liability Insurance

The most important type of insurance, the type which any day care program operator should think very long and hard about before deciding to go without, is liability insurance. Liability insurance is what protects you from the consequences of accidents which occur on your premises. In legal terms, liability insurance is what protects you against the consequences of "negligence". Without trying to define negligence, as a general rule you can assume that virtually any kind of accident which occurs on your premises is quite likely to be considered to have occurred as a

result of negligence, if the injured party should press the issue.

Most liability insurance policies cover four types of risks:

- Bodily injury which occurs accidentally;
- Damage to the property of another person which occurs accidentally;
- Expenses of immediate medical relief at the time of the accident;
- The legal costs of defending against suits by injured parties.

A policy which covers all four of these is called a general liability policy. A general liability policy is almost always expressed in terms of limits per person and per accident on amounts the insurance company will pay. For instance, the policy might be limited to $25,000 per person/ $100,000 per accident.

The dollar limits per person and per accident which you select when you purchase the insurance are a very large factor in determining what the premium (cost) of the insurance will be. Most people do not realize, however, that very substantial increases in the dollar limit do not carry with them proportional increases in the premium. For instance, under a typical policy, increasing the limits from $5,000/$10,000 to $100,000/$300,000 represents a 2,000 percent increase in coverage, but the increase in premium to get this extra coverage would typically be less than 100 percent, so you get twenty times the protection for less than twice the cost. Obviously, this is an area in which it is very easy to be "pennywise and pound foolish".

Automobile Insurance

Automobile insurance is a type of liability insurance--with personal property protection added on--but it is treated by the insurance industry as completely separate from other types of insurance. Virtually every state requires the owner of a motor vehicle to purchase liability insurance. As with the general liability insurance discussed above, the premium on automobile insurance is heavily dependent on the per person/per accident coverage limits and the deductibles which you select. Any day care program which owns vehicles in which children are transported or which permits its employees to use their own vehicles to transport children

would be very foolish not to acquire a large amount of insurance. There probably is no situation in which the degree of potential risk and amount of potential loss are greater.

In the typical program, there are no program-owned vehicles, but program staff people are permitted (or even requested or required) to use their own vehicles to transport children. From strictly financial and legal viewpoints, this is unwise and virtually any alternative--taxis, the children's neighbors, etc.--would be preferable. However, the reality is that it often seems necessary. One relatively simple way of dealing with that reality is for the program to pay to its staff people who use their cars whatever it costs them to increase their personal automobile insurance to a sufficiently high level to cover the program's possible liability. For instance, if the staff person normally carries only $10,000/$20,000 in auto insurance, the program might pay the additional premium needed to raise that to $50,000/$100,000.

Workman's Compensation

Like automobile insurance, workman's compensation is another special category of liability insurance which is treated separately from "general" liability insurance. Also like automobile insurance, workman's compensation insurance is required in most states, rather than optional. Most state laws do, however, contain exemptions from the requirement for certain classes of employers. A typical exemption which is applicable to many day care programs is the exemption for organizations with a small number of full-time employees.

Workman's compensation insurance is intended to protect against the consequences of injuries sustained by employees either on the program's premises or while performing duties for the program off the premises. Employees covered by workman's compensation laws are reimbursed for injuries only through workman's compensation benefits and in most cases may not sue the employer for negligence. A program which wants to protect itself needs what is called a "workman's compensation and employer's liability policy". Under such a policy, the insurance company pays 100 percent of all workman's compensation benefits which are required by state law. Such a policy would also cover any sums which the program might be held liable for in a court action by the injured employee in the rare states where such an action is permitted. In a few states, it is possible to get a comparatively inexpensive policy through an agency of the state itself, usually called something like the state insurance fund.

State laws determine the kind and amount of benefit payments available to employees covered by workman's compensation. Neither the employer-program nor the insurance company can alter these amounts. The premium which the day care program must pay for a workman's compensation and employer's liability policy is determined by the number of people on the payroll.

Workman's compensation law is discussed further in Chapter IX, "Personnel Law: Wages, Benefits and Working Conditions".

Fire and Theft Insurance

Insurance against losses from fire and theft can be purchased either together as a combined package or under separate policies. Normally, the more kinds of insurance you buy at one time from the same agent, the cheaper the whole package is. This will not necessarily be the case, however, for programs located in very large cities wishing to purchase theft insurance. Theft insurance can be exceptionally expensive and in some areas is, for all practical purposes, not obtainable.

Because of this fact, the federal government has initiated a crime insurance program. Under this program, federal crime insurance is sold in high-crime urban areas and the premiums involved are very small compared to rates charged by private insurance companies. It is sold through regular insurance agents who are all required by the government to offer this insurance. They are also required to inform you of its existence if you apply for more expensive private insurance. A few states have adopted state versions of federal crime insurance which in some instances have even lower premium rates than the federal rates. As with the federal insurance, these state insurance policies are usually handled by regular insurance agents.

Fire insurance is usually very strictly limited to losses caused directly by fire or lightning. It is possible, however, to purchase "extended coverage options" on fire insurance policies which will give protection against smoke damage, explosions, windstorms and even relatively unlikely events, such as riots and cars or airplanes crashing into your building.

Fidelity Bonds

An entirely different variety of insurance, usually called fidelity bonds, is available to protect against financial wrongdoing by the day care program's employees.

Fidelity bonds protect the program from any financial loss as a result of embezzlement by a staff member with access to the program's funds or from ordinary stealing by employees.

There are three different types of fidelity bonds. Individual bonds protect the program only against the wrongdoing of specific named individuals. Schedule bonds protect the program against wrongdoing by any employee whose name or position is on a list (the "Schedule") presented to the bonding company. Blanket bonds protect the program against loss by embezzlement or similar action by any employee of the program.

A program considering bonding named employees should be aware that the bonding company will conduct a character investigation on the employees before it decides whether to issue the bond.

Health Insurance

As a day care program becomes financially stable, it may wish to consider offering an employee group health insurance plan as a fringe benefit. Although there are many variations, group health insurance plans come in three major types. The first type is composed of plans whose benefits cover only basic medical and hospitalization costs plus the costs of medication. The second is the so-called "major medical plan" which attempts to cover the costs of "catastrophic" illnesses. Generally, these first two are combined in a single policy. The third is composed of the disability income plan which is a policy that pays an employee a certain percentage of his or her regular salary if the employee should suffer a long-term physical disability. People considering obtaining major medical plan coverage should be aware that insurance companies frequently require participants in major medical plans to purchase a small life insurance policy as well.

CONTRACTS

Insurance policies are by no means the only kind of contracts the typical day care program will enter into. In addition there are employment contracts, leases, contracts with parents for fees, contracts for food and supplies, contracts for personal services (with accountants, plumbers, maintenance people, etc.), contracts with funding sources, and various others. It is important that the operator(s) of a day care program have some familiarity with the nature of contracts in order to be able to run the program responsibly.

The essence of a contract is that it is a legally enforceable agreement. It is, in a sense, a promise which can be legally enforced. Unlike most promises, which at most have a certain "moral" obligation attached to them, a contract represents a promise which you have a legal obligation to fulfill. And, as with all legal obligations, if you do not fulfill it, you subject yourself to potential penalties.

There are three central elements of a contract, all three of which must be present in order for an agreement to be classified as a contract and therefore as a legally enforceable promise. The three central elements are:

- the offer;
- the acceptance;
- the consideration.

The offer is simply your proposal to the seller to buy a certain object at a certain price, or the seller's invitation to you to buy the object at that price. The acceptance is the seller's indication that he will supply the object you propose to buy at the quoted price, or your indication that you accept the seller's invitation to purchase it at that price. Consideration is the legal word for the price or value of what each party exchanges. For example, if you have a catalog from a stationary store which indicates that crayons are for sale at $.79 per box and you send the store your purchase order for 100 boxes, after which they are delivered to your program, your purchase order (or it could be your letter or telephone call) is the offer; the delivery of the crayons indicates the acceptance; and the consideration on your part is $79, while the consideration on the store's part is the 100 boxes of crayons.

Often people enter into contracts without knowing they have done so. Three misconceptions account for this situation. The first misconception is that a contract has been entered into only when a written document has been signed. This is not true; oral contracts are legally enforceable.

The second misconception is that contracts are entered into only when some particular formalities are observed, such as exchanging confirming letters. This is not true; no particular formalities are required provided the three elements noted above are present.

The third misconception is that a contract exists only where an exchange of money is involved. This is not

true; the consideration in a contract need not involve an exchange of money. The consideration requirement for a binding contract merely requires that something of value be exchanged. Thus, if you agree with John Jones to admit his three children to your program for a year in exchange for his cleaning the building every weekend, you have entered into a contract where Jones' consideration is his cleaning services and your consideration is your day care services provided to his children.

As indicated above, if you do not fulfill your obligation under a contract or, in other words, if you fail to provide your consideration, you subject yourself to potential penalties. The failure to fulfill your obligation, or "breaking" the contract, is called a "breach" and the potential penalty is referred to as the "damages" for the breach. The damages you incur for a breached contract are the sums you must pay to the other party to the contract. Thus the principal consequence of a contract breach is that it makes you liable to the other party for the financial impact your act has on that party. To take a simple example, if you entered into a contract to hire a plumber to do some work in your center and after the plumber arrives you decide for some reason that you don't want the work done after all, the plumber would have the right to seek damages from you in the amount of profit he expected to earn from the job.

Of course, in every contract breach situation, such as this one, there is the problem of "proving" by legally sufficient evidence that a valid contract was entered into and was breached. Obviously, this is a substantial difficulty where oral contracts and other contracts of a relatively informal nature are involved.

Awareness of this proof problem leads many people to treat contract breaches rather casually on the theory that "They'll never be able to prove it" or that "Even if they could prove it, they won't go to the bother". This attitude should be avoided by a day care program operator who is interested in running the program in a way which is responsible, which preserves good business relations in the community, and which avoids potential liabilities as much as possible. In addition, as many programs have painfully discovered, even a claim which ultimately will be unsuccessful because of proof problems or other reasons, can be a prolonged and time-consuming legal hassle if treated too casually at the outset.

CHAPTER VI

LIABILITY AND BOARD/DIRECTOR/STAFF LEGAL RELATIONSHIPS

HOW TO THINK ABOUT IT

THE TYPES OF LEGAL RELATIONSHIPS

THE TYPES OF LEGAL RESPONSIBILITY

THREE CENTRAL PRINCIPLES

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Chapter VI

LIABILITY AND BOARD/DIRECTOR/STAFF LEGAL RELATIONSHIPS

HOW TO THINK ABOUT IT

This chapter will consider issues of liability resulting from accidents or from other types of torts or from breaches of contract and will consider these issues in terms of the legal relationships between the staff, the executive director and the Board of Directors. Consider the following two situations:

1. Jane Jones, the executive director of the Happy Times Day Care Center, which is a not-for-profit corporation, was authorized last year by the Board of Directors to hire part-time employees at her own discretion whenever she considered it necessary so long as she reported her actions at the regular Board meetings. She hired Mary Murphy to come in for two hours each day to prepare a hot lunch for the children. One of the children wandered into the kitchen while Mary was working. Mary didn't see the child and accidently spilled boiling water on him. The child was badly burned, required extensive medical treatment for weeks, and his parents are planning to file a legal action. The Center doesn't have liability insurance, although Jane and the Board "have been thinking about it for a while". Who is liable for the expenses of the child's injuries--Jane, the executive director, or Mary, the cook, or the Board of Directors, or some combination of them?

2. The same situation described above except that this time the child was injured accidentally by Lena Lewis, who is an accountant Jane has hired to be a consultant to the program periodically. Lena, who comes into the Center several hours a month whenever Jane and her bookkeeper need a little extra assistance, had gone into the kitchen to make herself a cup of coffee when she accidentally spilled water on a child she didn't see behind her. Who is liable this time--Lena, or Jane, or the Board, or some combination of them?

Wondering about the answers to questions such as these has given many a day care operator a nervous headache.

Indeed, for many people involved in day care services one of the more worrisome organizational issues involves the various forms of legal (and, ultimately, financial) liability they are subject to if something goes wrong in the program. And in a program which is incorporated, probably the most confusing aspect of this liability issue is trying to figure out who is legally responsible for what in an organization which includes a staff, an executive director (or similarly titled person), and a Board of Directors (or Trustees or Overseers).

This liability issue involves a substantial number of legal complexities and it is beyond the scope of this Handbook to explore them in detail. In addition, since there is an endless number of possible details in a liability-producing situation and since differences in detail often produce differences in legal result, this is an area where it is often useful to seek some professional advice rather than relying entirely on your own judgment.

Nevertheless, the law concerning liability and the legal relationships between staff members, their director and the Board of Directors is not so mysterious and complex as to be understandable only by an attorney. It is possible for a person without a legal training to grasp quickly the basic principles involved and to develop a method for thinking about problems involving liability and responsibility, a method which will in most instances enable you to give quite accurate answers to your own questions. The purpose of this portion of the Handbook is to describe these principles and that method.

The method for thinking through issues of liability and legal relationships involves asking yourself four questions and evaluating answers to those questions in terms of the information summarized in this chapter. The four questions are:

- What type of legal relationship do the people who are potentially liable have with regard to each other?
- What type of legal liability is involved in the act in question?
- How do the three central principles described in this chapter apply to the situation?

What is the legal form of organization of the day care program?

THE TYPES OF LEGAL RELATIONSHIPS

In any day care program which employs more than a very small number of people, there are likely to be people in positions or roles which, in terms of legal categories, constitute three different types of legal relationships. The three types of legal relationships are:

- principal and agent;
- employer and independent contractor;
- master and servant.

Offensive though they are, the terms "master and servant" which have been used for hundreds of years in the law to describe what we now call employer and employee are still used frequently in the law to describe the employer-employee relationship. Legally, a "servant" (employee) is a person who is employed by another person on a regular basis to perform a general range of duties and who is subject to the orders of that other person (or the person's representative) with regard to the specifics of how the general duties shall be carried out. Most people who work in a day care program will be in this category.

The employer/independent contractor relationship is quite different from the master and servant relationship. Examples of independent contractors would include psychologists, plumbers, accountants, auditors, lawyers, curriculum consultants, etc. Unlike the situation with an employee, the employer has no right to give orders regarding the details of the independent contractor's work. Also unlike the employee, the independent contractor is generally hired for a very specific purpose and for a very limited time. And, usually, the employer is not as skillful as the independent contractor at whatever the independent contractor has been hired to do.

The principal/agent relationship exists with reference to contracts. The principal is the person for whom a contract is made and who will be liable for any breach of it. The agent is the person retained by a principal to make the contract (sign it, place the order, etc.). Thus an agent is a person who has the power to make contracts between the principal and third parties (stores, suppliers insurance companies, etc.) which are legally binding on the

principal. This power is called "agency". Although there are some exceptions, the general rule is that the power of agency is acquired only in situations where the principal specifically grants it or knowingly permits someone to act as though he or she has it. Thus, unless they are given such authority by their employers, employees and independent contractors do not normally have agency power. Typically, the Board of Directors (the principal in an incorporated program) will specify that the executive director is its agent in contract matters.

THE TYPES OF LEGAL RESPONSIBILITY

There are two major types of legal responsibility: criminal and civil. We won't concern ourselves with crime here since it is a much less likely event in a day care program, but it should be noted that certain crimes, particularly embezzlement, tax fraud and assault do occur in day care settings. Civil responsibility is divided into two categories:

- Contract liability;
- Tort liability.

Contract liability, as indicated in Chapter I, is simply your responsibility for the financial consequences of breaching (violating or breaking) a contract.

Tort liability is a bit more complicated. As explained in Chapter I, a tort is something which is illegal but which isn't a crime and isn't a contract breach. It is sometimes referred to as a "civil wrong". There are two pairs of sub-categories of torts:

- Physical and non-physical torts;
- Intentional and negligent torts.

Examples of physical torts include trespass, false imprisonment, and conversion, which is similar to stealing. Examples of non-physical torts include libel, slander, and misrepresentation. Trespass is the best example of an intentional tort. A negligent tort is an act which an "ordinarily prudent person" would not do, such as leaving a banana peel on the kitchen floor, causing an injury to someone.

The vast majority of torts are a result of negligence and courts frequently find negligence in situations where the average person, thinking only of the common usage

of the work "negligence", would not think negligence had been involved. In the two situations described at the beginning of this chapter, it is probable that both the cook and the accountant would be considered negligent. It is possible, also, that the Board of Directors would be considered negligent for permitting the center to be operated in such a fashion that children could enter the kitchen unnoticed.

THREE CENTRAL PRINCIPLES

In thinking through issues of liability and legal relationships to determine who is ultimately responsible for the financial consequences of an accident or of something else which "goes wrong" in the program, there are three central legal principles which must be understood:

- scope of authority;
- doctrine of respondeat superior;
- liability differences determined by employment relationships

The principle of scope of authority is based on the notion that ordinarily an employee is hired to perform a general range of duties of a certain type and that there are customary expectations about what those duties involve and how they will be performed. When an employee's actions are consistent with those expectations, the employee is said to be "acting within the scope of authority" of the job. Long ago the law developed a rule that when an employee is acting within the scope of authority of his or her job, the employee is not personally liable for the financial consequences of his or her actions; and when an employee's actions are outside the scope of authority, he or she will be held personally liable.

As an illustration, if Mary is hired as a cook and she spills hot food on someone while serving, she generally would not be held personally liable because serving hot food is within her scope of authority. But if John is hired just to shovel snow off the sidewalks and driveway and he, for some reason, ends up serving hot food which he spills, he may very well end up being personally liable since serving food is not within the scope of authority of what he was hired to do.

The phrase "respondeat superior" is just a lawyer's way of expressing in Latin the idea that "the boss is responsible for anything the employee does wrong". Under the doctrine

of respondeat superior, whenever an employee is engaged in the business of the organization and is acting within the scope of authority of his or her job, it is the employer who is responsible for the financial consequences of the employee's acts and not the employee. Thus in the first situation described at the beginning of the chapter, the respondeat superior doctrine would protect the cook against personal liablity and would make her employer, the program (through its Board of Directors), liable. The respondeat superior doctrine applies only to employees and not to independent contractors. So, in the second situation described at the beginning of the chapter, the accountant, who is an independent contractor rather than an employee, would be personally liable.

It should be apparent now that whether liability is imposed on a person or not, often depends on the category of employment relationship (employer, employee, independent contractor, principal, agent) which applies to the person. Three simple rules can summarize the differences in liability depending on category of employment relationship:

(1) Employers are not responsible for torts committed by independent contractors; the independent contractor is personally responsible.

(2) Employers are responsible for torts committed by employees; the employees are not personally liable, so long as they were engaged in the business of the organization and were acting within the scope of their authority.

(3) Principals are responsible for torts committed by their agents who are acting within the scope of their employment and on the business of their principal. In most cases, these will be torts of a non-physical nature (e.g., deceit or defamation), but they may also include physical torts if the agent is acting as an employee and not an independent contractor.

VARIATIONS IN LIABILITY DEPENDING ON ORGANIZATIONAL FORM

As indicated above, the issue of who is liable is largely determined by employment relationships within the organization; the issue of how much liability there will be is largely determined by the legal form of organization the day care program has chosen for itself. For day care programs

which are run as sole proprietorships or as partnerships or as profit corporations, the program is fully liable for all claims. This means that once liability has been determined, the program is obligated to pay the full amount of the liabiity no matter how high it may be.

For day care programs which are operated as not-for-profit corporations, their liability is still limited in a few states by the charitable immunity doctrine, an ancient legal rule that strictly limits the extent of liability of such organizations. The extent to which this doctrine is in force and the degree of limitation on liability where it is in force vary considerably. To find out whether it applies in your state, you can inquire at the same state office where incorporation papers for not-for-profit organizations are filed.

For day care programs which are operated by public agencies, the amount of liability is limited in some states by the doctrine of sovereign immunity (sometimes called "governmental immunity"). Under this doctrine, which is very similar to charitable immunity, public agencies can be held liable for the financial consequences of acts like torts only to a very limited extent. The extent of their liability is established either in a state statute or by a decision of the state courts.

PUTTING IT ALL TOGETHER

In thinking about situations which may involve financial liability, the first thing to consider should be whether you have acquired all the types of insurance you need and, if you have, whether you have acquired coverage in amounts which are adequate in terms of the potential risks. Any program which has no insurance or only token amounts of insurance is taking a serious gamble which could have very unfortunate consequences.

A review of the information presented in this Chapter and in Chapter V should enable you to reach a conclusion about your program's insurance status and to think through liability situations to a conclusion about who is likely to be held responsible. It should be pointed out, however, that there is always the possibility that your insurance company may discover some reason why your policy doesn't cover some particular event or the possibility that you may have misjudged what is an adequate amount of insurance.

The information presented in this Chapter can be summarized in the following manner: the first question to ask yourself is what type of liability is involved? Is it criminal or civil, and if it's civil, is it a breach of contract or a tort? Then ask what type of legal relationship exists between the people who you think are potential candidates for liability--Are they employer and employee or employer and independent contractor or principal and agent? Next, consider how the three central principles apply to the type of liability and type of legal relationship you have concluded were involved.

For instance, if the situation involves a tort committed by an employee, was the employee acting within the scope of his or her authority at the time of the accident? If the answer is yes, the principle of respondeat superior will make the employer and not the employee liable. Or, if the situation involves any kind of tort committed by an independent contractor or a physical tort committed by an agent who is not an employee, then that person will be liable personally.

Finally, if you have concluded it is the program (as employer or principal) which will be liable, consider whether the organizational form (corporation, partnership, etc.) of your day care program has any effect on the amount of liability. If the program is run as a sole proprietorship or a partnership or a profit corporation, it will be fully liable. If it is a not-for-profit corporation or a public agency, there may well be some limit on the amount of liability set by state law under the two immunity doctrines mentioned above, but it's unwise to rely too heavily on this.

As an illustration of this reasoning process at work, consider the following:

1. Theresa Trubble was hired as a "teacher aide" at Happy Times Day Care Center, a not-for-profit corporation of which Jane Jones is the executive director. The Center is in a state which has abolished the charitable immunity doctrine and therefore doesn't limit liability of not-for-profit corporations. Theresa was recently fired and Jane has now received an employment questionnaire from a place where Theresa has applied for work. On the questionnaire Jane writes that "Theresa was uncooperative, habitually late, often arrived in an intoxicated condition, and doesn't seem competent to care for small children."

Theresa doesn't get the job, is shown the questionnaire and sues Happy Times Day Care Center.

As executive director, Jane is the agent of the Board in all contract matters, including terminating employment contracts. Jane's statement on the questionnaire may well be libel (if it is untrue), which is a non-physical tort. A principal (the Board) must bear the liability for a non-physical tort performed by an agent. Therefore, if Theresa wins her suit, the program, not Jane, will be liable and it will be liable for whatever amount Theresa is awarded since there is no limitation on liability in that state.

2. Prior to being fired, Theresa Trubble participated in the monthly "staff days" at which problems with the kids, problems between staff members, new instructional materials, etc. were always discussed. Jane had hired a psychologist to sit in on these meetings to act as a facilitator, a non-involved observer and a professional resource person. This was the psychologist's only involvement at the Center. In the course of the last meeting before Theresa was fired, the psychologist said to the entire staff the same sentence which Jane wrote on the employment questionnaire above. Theresa has filed suit against the Center for the psychologist's statement also.

The psychologist's statement may well be slander (slander is oral; libel is written). Slander is a non-physical tort. However, the psychologist is an independent contractor and not an employee or an agent. Employers are not responsible for the torts of independent contractors. Consequently, the Center will not be liable for the psychologist's statement, but the psychologist would be liable personally if Theresa filed suit against him or her and won.

3. One of Theresa's duties as a teacher's aide was to keep the records of the children up-to-date with medical reports, permission slips, instructions from home, entries about special difficulties, etc. A social worker from a state agency which had as a client the mother of one of the children at the Center called and asked a number of questions about the child. Theresa read the contents of the child's file to the social worker. The child's mother has filed suit against the Center for invasion of privacy.

Invasion of privacy is a tort. Theresa was an employee of the Center at the time. Unless there is something in the personnel policy or in Theresa's job description prohibiting giving out information, Theresa's act was probably within the scope of her authority--it was reasonably related to what she was hired to do. Consequently, if the parent wins, the Center will be liable as the employer of an employee who committed a tort while acting within the scope of authority of her job; Theresa would not be liable personally.

Despite all the dire possibiliites explored in this Chapter and elsewhere in this Handbook, being a day care provider need not be thought of as a hazardous occupation. The key to avoiding difficulties is to have an awareness of how they might arise. Armed with that awareness, day care providers can protect themselves against most problems simply by thinking through the implications of their plans and by taking a few prudent actions in advance.

CHAPTER VII

LICENSING REQUIREMENTS

LICENSING AND POLICE POWER

NON-LICENSING SOURCES OF DAY CARE STANDARDS

EXAMPLES OF LICENSING REQUIREMENTS AND THE DHHSDCR

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Chapter VII

LICENSING REQUIREMENTS

Day care centers are subject in every state to some form of licensing. Unless your center falls within certain exceptions available in some states for churches, etc., you will not be able legally to run your center without the permission of your state, and in order to obtain that permission you will have to meet a set of requirements to the satisfaction of the state's day care licensing agency. Thus, one of the first things a potential provider must do is obtain a copy from the licensing agency of all of the rules and regulations that apply to day care centers.

The location of the principal day care licensing agency in the state's bureaucracy varies from state to state. In many states you will find it in the Department of Welfare, but it may also be in the Department of Public Health, the Department of Education or in some other agency such as Massachusetts' Office for Children. In some states you may also find licensing requirements imposed by your local town or city. Chicago, Denver, Kansas City and New York City are examples of cities which impose their own licensing requirements on centers.

LICENSING AND POLICE POWER

Licensing of day care centers is an exercise of a state's "police power". One of the most fundamental of a state's powers, "police power" is given to a state by its citizens so that the state can protect the health, safety and welfare of the public. In the case of day care centers, it is the children who attend these centers that the state means to protect by licensing. To serve that function, licensing is most properly designed to provide a base-line or minimal protection, imposing only those restrictions that are necessary to protect children against harm.

States have varied widely in their approaches to licensing. Some impose bare-bones requirements addressing physical conditions only; some use licensing as a way to hold day care centers to high standards of quality, addressing emotional needs and necessary conditions for the child's development. The trend appears to be toward establishing only such requirements as can be enforced as necessary to protect childrens' safety and health. The great unmet need

for day care services acts as a powerful force against a state using licensing to erect high barriers to the provision of such services. Other tools are available to develop high quality day care facilities beyond the basic level, and states and the federal government are beginning to use them. Use of these other tools leaves licensing free to insure not that a program is a high quality one but that it is not a dangerous, depriving or harmful one.

NON-LICENSING SOURCES OF DAY CARE STANDARDS

One example of a method sometimes used to impose higher standards than licensing is called "fiscal regulation". Under this approach, funding agencies may impose standards as conditions for day care centers to receive funds. This method can offer an effective "carrot" toward developing high quality day care facilities. The Federal Interagency Day Care Requirements (FIDCR), approved in 1968, which are now to be replaced by the 1980 Department of Health and Human Services Day Care Regulations (DHHSDCR), are the most familiar examples of such standard-setting, although the regulations actually include a mix of high "ideal" standards and base line "police power"-type standards. DHHSDCR standards are imposed as conditions which day care facilities must meet in order to receive federal assistance for the costs of day care under the Work Incentive Program, Title IV-B (Child Welfare Services) and Title XX (Social Services) of the Social Security Act, and Developmental Disability day care programs. *

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* As this report goes to print, the DHHSDCR are no longer in force. The Social Services Block Grant, which amended Title XX of the Social Security Act and which was enacted in October 1981, provided that centers need only meet applicable standards of state and local law as a condition for receiving Federal funds. The text describing the DHHSDCR was not omitted because some states are using the now defunct DHHSDCR as a model guide for revising their own standards.

In practice, to some extent a facility will see few significant differences between the Federal financing regulations and state licensing requirements as they affect the facility. Respecting the physical environment of the center, for example, the DHHSDCR require only that a facility meet the state's licensing and approval requirements. Furthermore, some states incorporate requirements similar to the federal regulations directly into their state licensing schemes affecting, for example, child/staff ratios. To these extents the difference between fiscal regulations and state licensing becomes blurred and standards for ideal quality and base line police-power standards become identical. Nevertheless, the DHHSDCR include several requirements which are generally stricter than a state's requirements. For example, while the DHHSDCR, and the earlier FIDCR set requirements for the maximum size of groups of mixed age in day care centers, only eighteen states specify group size requirements and of those a substantial number permit larger groups in centers than the federal requirements. Thus, at least in some areas, a center will find that the standards it must meet to qualify for federal funds are higher than those necessary simply to operate with a license.

Credentialing is another non-licensing method to insure quality, though it often is used as part of a licensing system. Credentialing is a way to regulate the quality of child care by certifying that a child care worker has met certain requirements to demonstrate competencies to work with children. Some states require that some staff at a day care center have completed certain academic work or be qualified as "Child Development Associates". Credentialing regulates staff and may be one requirement for licensing, but is not the same thing as licensing, which addresses not just staff but program, building, administration, group size, child/staff ratios and the like.

Accreditation is still another non-licensing method available to develop high quality day care. Generally a voluntary system, it involves the certification by an accrediting group, which may be public or private, and whose members may be fellow operators of facilities or consumers, that a program meets high standards. A day care facility would apply to such a group for accreditation and would receive a kind of "seal of approval" if it meets the required conditions. Such a system is not yet widely used, but there are some signs that it will develop in time. We mention it here to distinguish further between licensing as an exercise of police power aimed at preventing harm to children and other regulatory and non-regulatory methods aimed at holding day care facilities to standards of high quality.

EXAMPLES OF LICENSING REQUIREMENTS AND THE DHHSDCR

States impose a wide variety of requirements on day care facilities through licensing. You will need to study your own state's regulations carefully to discover what requirements affect your center, but they will typically include the following items. We will describe these items in comparison with the recently promulgated DHHS Day Care Requirements. Those regulations, as we have said, set the conditions upon which receipt of federal funds for day care from several programs will depend. As such they may be stricter than licensing requirements in some states. Even if your center will not seek to receive federal funds, however, you should be aware of the federal standards since state licensing authorities will often be guided by these standards in developing state standards.

1. Staff/Child Ratios. This is perhaps the most important area in the operation of a center, since staff salaries usually are the largest expense of a center. Depending on the ages of the children, required ratios of staff to children range from 1:4 for the youngest to 1:25 for the oldest. Nearly all states impose some required ratio. The DHHSDCR requirements in this area depend on whether a state measures by attendance figures or by enrollment figures. The following chart states the requirements:

DHHSDCR Staff/Child Ratios

Age of Child	Staffing Requirement Based on Enrollment	Staffing Requirement Based on Attendance
Birth to 2 years	1:3	1:3
2 years	1:4	1:4
3 to 6 years	1:9	1:8
6 to 10 years	1:16	1:14
10 to 14 years	1:20	1:18

2. Group Size. The number of states with maximum group size requirements (only 18 at this writing) may grow, since one of the findings of the National Day Care Study (Abt Associates) was that group size was a major factor in the quality of day care programs. In those cases where states impose on centers maximum group sizes, they usually vary according to the age of the children and range from about 15 to 25 or 30 children. The DHHSDCR, again depending on whether a state uses enrollment or attendance as the measure, imposes the following maximum sizes for groups at day care centers:

Age of Child	Maximum Group Size By Scheduled Enrollment	Maximum Group Size By Attendance
Birth to 2 years	6	6
2 years	12	12
3 to 6 years	18	16
6 to 10 years	16	14
10 to 14 years	20	18

The DHHSDCR permit larger groups at arrival and departure times, mealtimes, naptimes and special activities such as playground time or field trips.

3. Staff Qualifications. All states regulate the qualifications of staff to some extent, addressing, typically, age, education and experience. These requirements vary widely, however, and in several states there are no requirements for positions below the administrative staff. The DHHSDCR do not require particular staff qualifications but do require that centers provide orientation periods to staff and that staff without a "nationally recognized child development credential appropriate for the age of the children cared for" participate regularly in specialized child care training.

4. Record Requirements. Most states' licensing regulations require that some sort of written records be kept concerning each child, with information about parents, health reports, emergency procedures, transportation and the like. Written descriptions of programs are required to be kept by the DHHSDCR and by some states.

5. Physical Space. The majority of states require at least 35 square feet of indoor space per child. The requirements for outdoor space vary greatly with all states allowing for some alternative such as nearby parks or playgrounds. The DHHSDCR require in this and other physical environment areas only that the state or local licensing requirements be met. Those regulations do require, however, that a state establish some standards relating to sanitation and to safety in transportation, swimming facilities and equipment without specifying what those standards should be.

6. Equipment Requirements. Most state regulations include some requirements that equipment be available at a center suitable to the ages of the children. DHHSDCR do not include any specific requirements concerning equipment.

Other areas typically addressed in licensing regulations include health, fire and safety requirements, nutrition (often with detailed requirements regarding time

and content of hot and cold meals), and procedures for obtaining licenses, enforcement of regulations and appeals.

The DHHSDCR include, in addition, requirements that centers provide information to parents about where and how to obtain social services available in the community and several requirements to insure that parents are informed about the center, are given access to the center and are given "meaningful opportunities" to participate in policy-making.

OBTAINING A LICENSE

The process of obtaining a license to operate a day care facility is typically a long and complicated one that can take an average of one year of one person's work time. One reason it often takes so much time is that licensing requirements are usually linked with a number of other requirements imposed by other state and local agencies. In addition to the license requirements, for example, an operator will have to satisfy state and/or local safety, health, sanitation, fire and building requirements and insure that the location of the center complies with any local zoning requirements.

Some states, unfortunately rare, like Vermont have developed a systematic process that unites the numerous regulatory requirements and processes into a rational order an operator can easily follow. In most places, however, one of an operator's first and most important steps will be to gather all the regulatory timetables that his or her center will have to meet and on a large calendar or a long sheet of paper prepare a detailed schedule of deadlines and target dates. Try to work simultaneously with as many of the regulatory bodies as you can so that you can minimize the delays.

The license granting procedure typically begins with a determination whether a center must be licensed at all or falls under an exception to the general requirements. Exceptions to the licensing requirements are available usually where, for example, the child care is in the form of religious instruction, or is provided by a certified educational institution or on federal premises, or where it is provided briefly so that parents can shop or attend religious services or is provided by a public entity like a school.

If the determination is made that a facility must be licensed, there will be requirements for initial investigations including in the large majority of states an on-site

inspection by a licensing official. All states require, in addition, inspections by appropriate health and sanitation, fire and safety officials. A center must usually obtain certificates of approval, or permits, from those officials before it can be licensed. An operator has a right at this pre-license stage to present the center in the best light. S/he has a right also to prevent surprise or unannounced visits to the facility at this stage.

Nearly all states provide for temporary operation of centers where a license applicant is unable to meet all the requirements at the time s/he applies. In most states such a center may begin to operate under a provisional, or conditional, license or will be certified as being in "substantial compliance" with the licensing requirements.

A provisional license will permit a center to operate for a limited period of time, typically six months, without meeting all the requirements for a license, if the licensing agency sees no danger to children. In order to obtain such a provisional license a center must usually submit a plan showing the licensing authority how the center will overcome its deficiencies by the time the provisional license terminates. The large majority of states provide for one or more renewals of provisional licenses.

When a license is issued the certificate typically will state the name of the operator of the facility, the kind of program permitted, the number of children permitted and the period of effectiveness. Some states will require the payment of a fee to obtain the license.

The license will be effective for either one or two years depending on the state. Normally, toward the end of the term of the license the agency will send the necessary forms for renewal to the operator, typically 40-60 days before the license expires. The operator will then have to fill out the forms and submit them by the required deadline, usually about 30 days before expiration.

INSPECTIONS AND COMPLAINTS

After a facility is licensed it is subject in every state to inspections by the licensing agency, usually on at least an annual basis. If a complaint is made to a licensing agency about a center, it will nearly always be followed by an inspection visit unless it is determined that the complaint has no reasonable basis in fact or was made to harass the center.

If a complaint is made to the licensing agency, a dated report of the complaint will typically be filed in the agency's record of the center. At the time of the inspection the official is required to inform the center what the complaint was about but usually may not reveal the source of the complaint. Normally there are specific legal prohibitions against the operator of the center retaliating against a known complainant.

If you know that the complaint was made merely because of some disagreement between you and the complainant, you can tell the inspector about the situation. In most cases the complaint processing ends with a finding of no problem at the center by the inspector.

In most states inspection visits after the issuance of a license may be unannounced. Objections to this practice on grounds of privacy, the right against search and seizure without a warrant and the possibility of endangering the children in care have frequently been raised by operators, occasionally in lawsuits against agencies. Against these arguments has been raised the necessity of surprise for a state to carry out its responsibility to protect children against facilities falling below the standards set by licensing. The issue raises constitutional questions which have not been definitively resolved by the United States Supreme Court. As of this writing, the power of the licensing agency to make an unannounced inspection still stands in most states.

When an inspector arrives at the center, you should ask to see his or her credentials and to know the substance of the complaint. Let the inspector make the inspection; resisting the inspection may be sufficient ground alone to permit the agency to revoke your license.

REVOCATION OF A LICENSE: DUE PROCESS RIGHTS

All operators of centers should familiarize themselves with their state's laws which establish the grounds on which their license can be revoked. You have the right to keep a license, whether provisional or full, and to have that license renewed unless and until the licensing agency can prove conclusively that one or more of the grounds for revocation exist. Having received a license you have a "vested interest" in the license and the right to due process if the state seeks to remove it. In most states you have the right to a reasonable period of time in which to correct any deficiencies in your facility before the state can take steps toward revocation.

The process which is legally due a provider includes the right to be informed of all violations found in an inspection--that is, of every ground on which the agency seeks to revoke your license. In stating its grounds, furthermore, the state must tell you exactly which regulation it claims you have violated. The state cannot change its position by giving you a notice of certain deficiencies, which you then correct, and then proceeding to revoke your license on grounds of other deficiencies.

Your right to due process means, most importantly, that you have a right to appeal a decision and to present your side at a hearing if your facility is threatened with suspension or revocation of a license or your application for a license is denied. (This right extends to the denial or revocation by any agency of any of the permits such as fire, safety, or health and sanitation which you must hold to operate your center. Check your state's law to find out what the specific requirements are including what agency holds the hearing, what timetables apply to that hearing and what rights you have at the hearing.)

When a decision is made to deny or to seek to revoke a license the agency must notify you in writing of the reasons for its decision and tell you what steps you must take to appeal its decision. You will then face in most states a period of several months before you have your appeal heard. During that time your ability to operate your center depends on whether you have held a license or are applying for your first license. If the state is denying your application for a first license, you will not be permitted to operate while awaiting the hearing, unless you have been operating under a provisional license which has not been revoked. If the state is seeking to revoke or suspend your license, however, you have the right, except in an emergency situation (discussed below), to continue to operate until a hearing is held and a decision is made against you. A few states attempt to have a facility cease operating pending a hearing if a provider is being denied the renewal of a license, but the lack of a real distinction between this situation and one where the state seeks to revoke a license makes such a practice legally questionable. To be certain your rights will be preserved, be sure to consult with a lawyer in any case when you are faced with a decision by the state to seek to prevent you from operating.

In every state there is a procedure whereby the state can close a day care facility immediately when necessary to protect children from a substantial and immediate threat to their health or safety. In many states the attorney general's office or the district attorney may go to court

to obtain an injunction (a court order) against the continued operation of a center if such a threat exists. In such states a temporary order may be obtained to close a center without notifying the provider if the state can show that immediate and irreparable injury, loss or damage will result before the provider can be heard in opposition. Even if the court issues such a temporary restraining order, however, the order normally may not exist more than ten days and the provider has a right to be heard within a reasonable time in court on whether the court should issue an injunction. If the state seeks an injunction to close your center you will need a lawyer to represent you and should obtain one as quickly as possible. Where states rely on procedures other than injunctions to close facilities, the provider has a similar right to a hearing within a reasonable time.

CONDUCT OF A HEARING

If the injunction process is not followed and you request a hearing to contest the state's decision to remove or deny your license, you should study carefully the statutes and regulations which will tell you about how that hearing will be conducted. If those rules are not included with the notice you receive of the agency's determination about your license, you should contact the agency to obtain those rules. Such a hearing will usually not be held in a courtroom, but in an office or a conference room of the administrative agency. The hearing will be governed by procedural rules that apply to that agency or generally to administrative hearings in your state. The hearing will be more informal than a trial in court. A hearing officer, usually an attorney, will conduct it and eventually make a decision on the case. Most of the rules of evidence which apply in court will not apply, except for the rules of privilege (i.e., that communications made to an attorney for the purpose of seeking his/her counsel will be privileged as, usually, will communications to a doctor, to a priest, minister or rabbi, or to a spouse). The hearing officer will normally try to exclude irrelevant or repetitious evidence.

In most states, you will be able to represent yourself at the hearing or to have a lawyer or other person represent you. All the testimony will be given under oath and recorded in some manner, often by tape. You or your representative will be permitted to present documents in evidence and to present witnesses on your behalf. Each side (the provider and a representative of the licensing agency) will be permitted to cross-examine the other side's witnesses, to examine all documents introduced into evidence and to make opening and closing statements.

Before the hearing you may have rights under your state's rules to "discover" certain information. As the term implies, this means that by following the procedures in the rules governing the hearing, you may be able to obtain copies of any documents the state has which pertain to your case and to find out the names of any witnesses the state plans to have testify against your holding a license. You may have to have the hearing officer order the state to give you the information or you may be able to obtain it on your own, depending on the rules. It is very important to take advantage of any procedures that give you access to such information well before the hearing. Information about the state's arguments and evidence will enable you to plan and organize your presentation in the most effective way by alerting you to each point the state will rely on that you must meet.

In most administrative processes, hearing officers will themselves ask witnesses and parties many questions to be certain they have a complete record. They will be especially active in a hearing where a party is not represented by a lawyer, to be sure that that party's rights in the hearing will be protected. Nevertheless, it is a good idea at least to seek advice from a lawyer with knowledge of day care licensing and hearing procedures, and if possible to have that person help you prepare for and accompany you to the hearing. No matter how sophisticated or knowledgeable you may be, the maxim that a person is his or her own worst lawyer holds true in most hearing-type contexts simply because the person has too much at stake to plan and proceed objectively and effectively.

The administrative hearing on your license should be taken very seriously, even though a decision against the provider may be appealed to a higher agency or to a court. In the first place, appeals to court will be costly and often much-delayed. Second, it is very difficult generally to persuade a court to overturn an administrative decision; a court will uphold a decision by a hearing officer or higher administrative body if there is substantial evidence in the record to support that decision and there are no errors of law. Even if there is much conflicting evidence at the hearing and the judge on reviewing that evidence thinks he or she would have decided differently, the court will uphold the agency unless the agency misunderstood or misstated the law.

Usually you will not be given a decision immediately at the close of a hearing. Instead, the hearing officer will write the decision and mail it to the parties some two weeks to several months after the hearing. If the decision is against you, you will have the right to appeal to a higher administrative level or to a court, depending on your state's scheme. If your appeal is to a court you will need to retain a lawyer.

CRIMINAL ACTIONS

Behind the administrative processes for granting, renewing and revoking a day care center license lies the state's criminal machinery to insure that no center will operate without a license. As we pointed out at the beginning of this chapter, licensing is an exercise of the state's police power, whereby the state makes it illegal to provide care for children in a day care center setting without a license--that is, without submitting to the administrative processes we have been discussing--established to provide a base of safety and health below which regular child care outside the home must not fall. Thus, where a center operates without a license or persists in violating licensing requirements, most states treat the operation as a misdemeanor subject to fines or imprisonment or both. As a practical matter, criminal actions will not be brought except in very serious cases where other means have failed. If you are subject to such an action you will need a lawyer. If you can't afford to hire one the court will provide one.

CONCLUSION

Since licensing schemes vary widely from state to state, we have been able only to describe typical provisions and procedures. Thus, one of the first documents a potential provider should obtain is the licensing regulations of his or her state. Beyond learning and complying with these regulations, it is important that providers communicate with one another and, perhaps, with the licensing agency about the difficulties posed by unnecessary or unfeasible requirements. Licensing regulations must be clear, understandable, measurable, reasonable, and consistently interpreted. If they fall short they can be changed and the agency can be held accountable for its enforcement practices. Providers, as well as consumers, have a right to press for such changes and hold their licensors accountable.

CHAPTER VIII

ZONING

WHAT ZONING IS

STATE ZONING ENABLING LAWS

ZONING CLASSIFICATIONS: THE TYPICAL ORDINANCE

ZONING TREATMENT OF DAY CARE

ZONING FLEXIBILITY

OBTAINING ZONING FLEXIBILITY FOR DAY CARE

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Chapter VIII

ZONING

WHAT ZONING IS

Zoning is a process for regulation of the use of land. Each city and town is enabled by a state zoning law to divide its land into districts and within those districts to regulate and restrict the erection and use of buildings, structures and the land itself. Local governments, if they choose to zone, implement these powers in the form of local zoning ordinances, by-laws, or zoning codes, which describe in detail the districts of a town, the permitted land uses within each district and the procedures for applying for permits, appealing from denials, and for enforcement against violations of the code.

Like licensing of day care facilities, zoning by a state and its local cities and towns is an exercise of the "police power". As such, zoning power is based on the authority given to a state by its citizens to promote and protect the community's health, safety, and welfare. Any exercise of the zoning power must be consistent with these purposes in order to be valid.

In some areas confusion is created by an overlapping between day care licensing requirements and zoning restrictions. Zoning is not licensing for day care centers and should not attempt to perform that function by imposing requirements on day care centers that overlap or, worse, conflict with a state's licensing regulations. Nor is it usually sensible for a day care licensing scheme to include the requirement that local zoning ordinances be complied with, as many states do, since combining the two regulatory requirements often adds significantly to the delays before a day care center can be licensed and begin to operate. Zoning requirements must be met or waived in any case, and adding the requirement to the licensing regulations seems an unnecessary complication.

Zoning is also not the same as, and should not include the fire, safety and sanitation requirements that must be met for permission to occupy and use a building for a day care center. Again, any overlap of the areas creates unnecessary complications for the operator of a proposed center who must answer to more than one agency for similar requirements.

STATE ZONING ENABLING LAWS

Typically, a state's enabling law requires that local zoning requirements be uniform throughout each district. That is, there can be no discrimination within a district, though regulations for one district may differ from those in other districts.

State enabling laws also typically require that zoning regulations be based on a comprehensive plan. This means that a town may not enact haphazard or piecemeal zoning regulations. Zoning should be done on the basis of a plan applicable throughout the town which considers, for example, the overall needs of the town for transportation, water, sewage, schools and other public requirements. As we shall discuss, day care facilities are only beginning to be seen as meeting a public requirement and, thus, tend to be blocked in various ways by zoning restrictions.

Under most state laws, a town or city's zoning code is adopted only after a public hearing at which interested citizens have an opportunity to be heard. A zoning plan will be proposed at the hearing by a planning commission, or zoning commission, appointed by the town's governing body. Typically, the code which is then adopted cannot be amended or repealed over the objections of a certain percentage (often 20%) of the citizens affected by the proposed change without a two-thirds or three-fourths vote of the town's legislative body following another public hearing.

State zoning statutes usually require further that local zoning appeal boards be established to serve at least three purposes: (1) to hear and decide on appeals from adverse decisions by administrative officials enforcing the zoning law; (2) to hear and decide on petitions for special exceptions, or conditional use permits, to be made under the zoning ordinance; and (3) to authorize a variance from the terms of the zoning regulations.

If a proponent or opponent to a petition to the zoning appeals board, or, in most cases, any taxpayer, is unhappy with the decision of the board, a further appeal may be made to a court. The court's review of the decision will be very limited in most cases, however. The court will review the zoning decision only to find if it is based on an error of law or is arbitrary, capricious, oppressive or constitutes an abuse of the board's discretion. Courts will usually defer to a board's determination of the facts and its opinion based on those facts. Even if the court would have made a different decision than the board, if there is what is called "substantial evidence" to support the Board's decision,

the court will let it stand. It is very important in this light to present all the evidence you have to the zoning board and to treat that hearing as if it were the final appeal since it is very difficult to overturn its decision in court.

ZONING CLASSIFICATIONS: THE TYPICAL ORDINANCE

Typically a local zoning ordinance will divide a town or city into districts devoted to residential housing, commercial uses, industrial uses, agricultural uses, and public and recreational uses. These categories are often further divided in more sophisticated schemes into various levels of density of use. For example, residential uses may be divided into one-family residential districts, two-family districts, low density and high density multiple residential districts. Likewise, business, commercial and industrial districts may be subdivided into light or low density and heavy use districts.

The zoning ordinance will thus establish what uses may be made of which districts. It will also, typically, contain detailed restrictions, according to the use permitted in a district, concerning the height and bulk of buildings, floor area ratios, lot size, and required parking space availability.

The ordinance will also set forth the methods by which it is to be enforced. Typically, the official or agency in charge of zoning administration will be given authority to serve notices of violation on owners of land within a district acting in violation of the ordinance, requiring the removal of the unlawful use. He may also ask the District Attorney to institute legal proceedings and the police to assist. Usually the violation may be subject to either civil or criminal penalties, with each day of an illegal use counted as a separate violation subject to a fine or imprisonment.

ZONING TREATMENT OF DAY CARE

Day care centers are often not explicitly included as a permitted use within a zoning plan. Where they are included, they typically are treated as a commercial use and are excluded from residential sections and other business and industrial sections. Such treatment fails to recognize the community-service character of day care programs, regardless of whether they are profit-making or not-for-profit. This treatment also ignores the community-wide need for such

services and fails to recognize the essential similarity between day care center operations and those of a similarly-sized elementary school which may be located wherever needed. Even where day care centers are permitted to operate, zoning codes often contain physical requirements governing, for example, parking areas and lot size, that may be unrealistic and unnecessary for day care centers. In general, day care centers have been treated by municipal planners as a "problem use" to be allowed only with special conditions and restrictions.

A task force report issued in 1972 by the Federal Department of Health, Education and Welfare (HEW) (now Health and Human Services) stated that day care should be treated not as a "problem use" but as a community facility to be planned and encouraged with few requirements concerning the physical characteristics of a center. These should include only such requirements as would be applied to a small school: fencing or a buffer from abutting property, access to a useable play area in accordance with the state's licensing requirements, off-street loading and delivery access, no greater parking requirements than are applied to similar uses, and accessibility for fire and other emergency vehicles.

As the need for day care grows and education about day care spreads, a zoning position like that recommended by the HEW task force will probably be adopted in more areas. Meanwhile, zoning plans continue to treat day care in many areas as a problem to be curtailed rather than a service to be encouraged. There are ways to challenge and change these inappropriate treatments of day care, as we shall discuss below, but the first step for a prospective day care provider is to "know the territory".

Before signing a purchase and sale agreement, or entering a contract to build a day care facility, a prospective day care operator should investigate whether the site selected is in a zoning district that will permit the center to be built or renovated and operated, and, if so, whether conditions will be imposed that make operation of the center difficult. As a purchaser you will be responsible for knowing the zoning situation and ordinarily, in most states, you will not be able to cancel your agreement to purchase on the grounds that you later found the zone did not permit day care. If there is some doubt or ambiguity in the zoning code and you must, for some reason, proceed with the purchase of a site before you can obtain a decision, your lawyer should build protection into the contract by, for example, making the agreement to purchase conditional upon a favorable determination by the zoning officials.

ZONING FLEXIBILITY

If a town's zoning plan does not appear to permit the operation of a day care center in the district you have selected, that may not be the final word. There are three ways, typically, an owner can put his or her land to a use not explicitly permitted in a district, any of which may in a given case be available to a day care center: (1) the use may be a "non-conforming" use existing at the time a zoning ordinance is passed; (2) it may be permitted as a "special use"; or (3) it may be permitted as a "variance".

If a day care center is in operation in an area that has not previously been zoned or which has been zoned to permit its operation, a change in the zoning situation may make the center a "non-conforming use". Under most zoning plans a non-conforming use may continue to exist in a district for a given number of years even though a new non-conforming use could not be built or begin to operate.

A "special use" is one which is not explicitly permitted by a zoning plan in any district, but which may be specially permitted by a zoning board. This is a category reserved for uses considered to be essentially desirable and necessary to a community, but which because of their nature or the noise, traffic or other problems associated with them are treated as special uses to be handled on a case-by-case basis. Schools, hospitals, religious institutions and the like are often numbered among these uses. The special use process is designed, generally, to give a zoning agency the power to design restrictions for those publicly necessary uses for which it is difficult to specify adequate conditions in advance. Often, where day care is not included or acknowledged in a zoning plan as an ordinary use, it will be subject to the process for obtaining a special use permit in whatever zone the owner wishes to locate. In that case the owner will have to file a special use application, present his or her case to the zoning board and wait, often several months, for a decision.

The third method by which a day care center may be able to operate in a district not zoned for such a use is to obtain a "variance" from the zoning board. A variance is, in effect, a waiver of the zoning restrictions. In this case, unlike the "special use", the day care use might be explicitly permitted under the ordinance in other districts, but not in the district a center seeks to use.

Usually to obtain a variance a center would have to show that to restrict it from operating would pose practical difficulties and unnecessary hardship on the owner's use of

the land. The standards a board must use in granting a variance typically require that an owner show that the ordinance works a singular hardship on his particular property, different from the effect on other property in the district. The hardship is measured usually in economic terms, an owner generally arguing that without a variance s/he will be unable to make a reasonable economic return on the investment in the property. Variance processes differ significantly from locality to locality, however, and despite these economic standards which could probably not be met by most day care centers, it may be worth inquiring into the practices of the zoning board in your area to see if a center might be successful in obtaining a variance. Again, you should inquire into the zoning possibilities before you acquire property.

OBTAINING ZONING FLEXIBILITY FOR DAY CARE

For a variance or a special use permit, and often to protect a pre-existing, non-conforming use, a day care center will have to participate in a process involving a petition, or application, a public hearing, an administrative decision and, possibly, further court appeals. Either with the application or at the hearing the center will be required to present various documents showing such things as its building plans, a map of the neighborhood, information about its proposed program and the like. The public is notified of such hearings and they are often well-attended by interested neighbors, pro or con. Neighbors will sign petitions and in some cases testify about their concerns.

A day care provider wishing to operate in a given neighborhood where a special permit or variance is necessary is well-advised to approach neighbors openly and try to anticipate the problems they may raise. If you can gain their support, or at least neutrality, by agreeing to operate only within certain hours, to erect a fence to buffer playground noise or the like, you will have a significant head-start in the zoning process.

Witnesses who may be helpful to a petitioning provider include neighbors favorable to the center, an expert in day care who can testify to the desirability of the property for a center, an expert in property values who can defuse any suggestions that a center would significantly lower property values in the area, and a person familiar with the program the center will operate who can testify about the extent to which the center would affect traffic and noise in the area. It may be helpful also to introduce testimony comparing the operation of your center with the neighborhood effects of a similarly sized elementary school. Usually day care centers

are considerably smaller than even the smallest elementary schools. As we shall discuss below, one of the best ways to convince a zoning board to permit a day care center use may be to emphasize its similarity to a use which is ordinarily and readily permitted in an area--that of a public school.

Since success with the zoning issue is critical to the operation of the center and since the issues can become quite complicated, a day care center should consult with a lawyer or an expert in the area of real property and zoning procedures to assist it in the process.

IMPROVING THE ZONING STATUS OF DAY CARE

In most states certain land uses are treated by state law, zoning ordinances or by courts, or all, as "preferred" uses. These typically include educational, religious and charitable uses--generally uses that are seen as inherently beneficial to the public. Where local ordinance restricts these uses, a court will typically place a heavier than normal burden on the local government to justify such limitations. Courts will treat a land use as inherently beneficial--as a preferred use--either on the basis of the state law giving the use such status or of the court's own determination of public policy. In a small but growing number of states day care is beginning to be given such preferred use status, either on its own merits or by treating it as similar to already recognized preferred uses.

Some courts have found day care centers to be "educational" uses by defining the term "education" broadly. Centers that offer experiences to children that help them progress in arts and social development as well as in more narrowly defined educational areas may be treated as educational uses and accorded preferential zoning consideration by sympathetic courts.

Some centers may also attain preferred use status on religious grounds where they are affiliated with churches. However, where the child care provided is daily and appears similar to non-church-affiliated day care, only those courts willing to take a very broad view of the term "religious" are inclined to give preferred use status on religious grounds.

The strongest case for preferred use status would be for courts to treat day care as inherently beneficial on its own terms, rather than attemping to squeeze it into an educational or religious or other preferred-use mold. The benefits of day care both to the child and to the working parents as well as the particular benefits of having a day

care center close to the child's home are reasons that should be stressed to courts and zoning officials in attempting to gain such preferred treatment.

Another perspective which may gain day care centers a more favorable zoning status in their communities is based on a comparison of day care centers with other uses in a given district. A zoning ordinance that permits small elementary schools to operate in the same district from which it excludes day care centers may be found by a court to be unlawfully discriminatory or unreasonable. The impact of a day care center on the surrounding community is not in most cases very different from, indeed, is usually less than that of a small public school, as long as the center maintains similar provisions for parking space and buffers against noise.

A day care provider should be familiar with these arguments not just for their possible impact on a court when a restrictive zoning provision is being challenged, but also for their educational impact in the provider's communications with his or her neighbors, zoning officials and the community at large.

CONCLUSION

While day care has been treated historically as a problem land use in zoning to be restricted rather than encouraged, the growing need for day care and the growing familiarity of communities with day care are combining to improve its status. Day care providers should be familiar with the various methods outlined in this Chapter for operating in spite of restrictive zoning systems and should incorporate the potential delays in obtaining zoning permits into their start-up plans. In the longer run, it is also important to communicate openly with neighbors and officials so that eventually day care will come to occupy the preferred position in zoning schemes now afforded to other community service facilities.

CHAPTER IX

PERSONNEL LAW: WAGES, BENEFITS AND WORKING CONDITIONS

WAGES, BENEFITS AND WORKING CONDITIONS: SUMMARY OF LAWS

Fair Labor Standards Act

Federal Wage Garnishment Law

Federal Unemployment Tax Act of 1939/Social Security Act of 1935

Workman's Compensation

Federal Occupational Safety and Health Act of 1970

Employee Retirement and Income Security Act

National Labor Relations Act

A NOTE ON PERSONNEL POLICY STATEMENTS

Chapter IX

PERSONNEL LAW: WAGES, BENEFITS AND WORKING CONDITIONS

Day care centers are subject to several laws and regulations that affect and define their relations with their employees. In most cases these laws require no more than you would do as a matter of common sense, fair treatment and the maintenance of good working relationships between employers and employees. Their impact frequently, however, is to bog down an employer in paper work and to present him or her with difficult issues at every stage of the employment relationship.

These issues include for example: how to hire the most competent child-care staff without asking questions that could be taken as discriminatory; whether to recognize and bargain collectively with a group of employees; whether to go along with or to challenge a former employee's claim for unemployment compensation. In these and other areas involving employees, employers at day care centers have to walk a narrow path between giving up their rights as employers on one side and appearing to have a negative attitude toward employees' rights on the other. In any event, it is highly important for a day care director to know the laws relating to personnel so s/he can manage the program and lead the staff effectively.

Some personnel laws have been in effect only a short time; the question of how they apply to a day care center may not have been resolved yet. Frequently enforcement officials differ among themselves about how a law should be interpreted. Usually the laws apply generally to industrial and large commercial settings as well as to smaller businesses like day care centers; their unmodified application to the smaller settings can sometimes create real burdens in time and money for those businesses. In the midst of this confusion, an operator of a center should keep in mind that s/he has the right to question an agency's interpretations of statutes and regulations, to request that other agency officials join in determining the application of the law to the center, and to learn from the agency how the same law is being interpreted and applied elsewhere. If an interpretation of a statute or regulation or its application to a center appears to be unreasonably oppressive, arbitrary or discriminatory, it might be successfully challenged at a higher level of the enforcing agency or in a court.

The major laws relating to personnel of which operators should be aware fall into two broad groups: those having to do with wages, benefits and working conditions, summarized below, and those designed to prevent discrimination, which are the subject of the next chapter. Our discussion of these laws will serve as a general guide, but in any particular situation a day care center will have to find out the current status of the law. The information in this handbook can be outdated quickly through amendments, new laws or new interpretations that could change the way in which the law applies to day care centers.

WAGES, BENEFITS AND WORKING CONDITIONS: SUMMARY OF LAWS

Fair Labor Standards Act

The Federal government and most states have established laws relating to minimum wages, overtime pay and other basic provisions of the work environment. You should check with your state's labor department or similar agency to find out your state's requirements in these areas. Under the Federal Fair Labor Standards Act of 1938, as amended by the Education Amendments of 1972, all preschools, whether public or private, whether for-profit or not-for-profit, must pay the minimum wage to employees. As of this writing the minimum wage rate, beginning January 1, 1980, is $3.35/hour.

An establishment that employs only members of the owner's immediate family is exempt. The Act also exempts executive, administrative and professional employees, including teachers, from its provisions. The question arises often whether a particular employee at a day care center is a "teacher" and thus not covered by the FLSA. Generally, if a person's primary duty is to care for the physical needs of a child s/he will not be regarded as a teacher, but if s/he primarily provides educational services s/he may be exempt from the Act.

The FLSA also prohibits discrimination in pay on the basis of sex between employees doing equal work with substantially equal skill, effort and responsibility under similar working conditions. The Act imposes further requirements regarding overtime pay (1 1/2 times the regular rate after 40 hours of work in a workweek), child labor (16 years the basic minimum age, with children 14 and 15 years old permitted to work limited hours outside of school hours), and record-keeping. The FLSA does not require vacations, holidays, severance or sick pay; it does not limit the number of hours a person over 16 may work; it does not require premium pay for holiday work, pay raises or any fringe benefits. The employer must keep records and must post a notice displaying the requirements of the FLSA.

The agency responsible for enforcement of the FLSA is the Wage and Hour Division of the United States Department of Labor. If investigators find a violation, the agency may require back payment of unpaid minimim or overtime wages, or in some cases sue for back pay plus an equal amount as additional damages. The agency may also seek an injunction against further violations of the law. An employee may sue on his or her own behalf for back wages plus additional damages. It is unlawful to discharge or take other action against an employee for filing a complaint or participating in a proceeding under this Act.

A two-year statute of limitations applies to recovery of back wages except where a violation is found to be willful, in which case a three-year statute of limitations applies. The term "willful" is defined in various ways in the law, but always means at least "intentional". A willful violator of the FLSA would be one who sets out purposefully to violate it, as opposed to one who violated it unintentionally. Willful violations may be prosecuted criminally with a possible fine of up to $10,000 for each violation.

In most cases where a violation is found, the agency will be satisfied with an employer's agreement to pay back wages, and will not seek further remedies in court. Nevertheless, any notice of a violation of the FLSA, or inquiry by the Wage and Hour Division is a serious matter which can involve complicated negotiations and considerable expense. The best way to prevent unneccesary complications is to keep simple, clear and thorough records of employees' hours worked and wages paid and to comply with the wage requirements scrupulously. Confused record-keeping in itself often appears to the enforcing agency as a sign that the law is being violated. In the event of an investigation or a notice of a violation from the agency you should consult with a lawyer.

Federal Wage Garnishment Law

Another Federal law that bears on wages and working conditions is the Federal Wage Garnishment Law (Title III of the Consumer Credit Protection Act), which restricts the amount of an employee's earnings that may be deducted in any week through garnishment, and prohibits, under most conditions, the discharge of an employee on the basis of his or her being subject to garnishment. Most states have equivalent or stricter provisions relating to garnishment which you can learn about by checking with your state's labor department or similar agency.

Federal Unemployment Tax Act of 1939/ Social Security Act of 1935

Federal and state laws combine to provide unemployment insurance benefits to most employees, under the Federal Unemployment Tax Act of 1939 and the Social Security Act of 1935 as amended. A for-profit employer with a payroll of at least $1,500 in a calendar year or which employs at least one worker for at least one day per week in 20 weeks in a year must participate in this program. A not-for-profit corporation with four or more employees for at least two weeks of a calendar year must participate in most state programs.

Under the unemployment insurance program workers who have been employed long enough to qualify and who are out of work through no fault of their own are provided a weekly income for a limited time. States vary in their ways of determining eligibility and level of benefits but the federal law establishes the general requirements: an employee (1) must be able and available to work, (2) must be free from disqualification (for example, an employee may be disqualified if fired for misconduct that is against the interests of his or her employer, or if s/he quits employment voluntarily without good cause) and (3) must not refuse suitable employment. The Federal law also provides that a worker may refuse employment if (1) the job is available because of a labor dispute, (2) the wages or work conditions are substantially lower than area standards, or (3) the employee would be required to join a company union or refrain from joining a labor organization as a condition for taking the job.

Under the unemployment insurance laws an employer may either contribute to an unemployment insurance fund or insure itself. The rates and taxes are determined by several factors, including whether the employer is a for-profit or not-for-profit organization. A day care center operator should carefully study the factors to ensure the lowest possible rate is applied. S/he should also evaluate the potential cost of the center paying benefits itself to an ex-employee to determine whether the center can afford to risk insuring itself, instead of contributing to an insurance fund. This evaluation would be similar to the balancing of risk against loss a center should do in deciding on its insurance coverage (See Chapter V).

Workman's Compensation

In every state employers must also participate in some form of a workman's compensation program. As discussed in Chapter V, unless your day care center is exempt under your state's law, it will be required to purchase private insurance, self-insure or in some cases contribute to a

state-operated fund to provide compensation to an employee injured by an accident in the course of and arising out of his or her employment. Programs vary considerably from state to state, but the general principles are fairly uniform: An employee injured on the job (or, typically, travelling to or from the job) is automatically entitled to benefits, and the employer's responsibility to provide benefits is automatic regardless of negligence or fault.

Only employees are covered, not independent contractors. This provision causes a large amount of litigation, since the differences, legally, between independent contractors--who do not submit to the directions of an employer concerning how they perform their work--and employees are often hazy. A day care operator is well-advised to insist that any contractors doing work at the center certify that they are adequately insured so that they will not claim later to have been acting as employees. (See discussion of independent contractors in Chapter VI).

Injured employees, and in the case of a death, their dependents, are entitled, typically, to one-half to two-thirds of their weekly wage plus hospital and medical benefits. In return employees give up their rights to sue their employer for damages due to injuries covered by the law. They may, however, sue any person who by their negligence caused the injury. If such a suit is successful, the employer is entitled to reimbursement for any payments made toward compensation and the employee is entitled to the balance.

As with the unemployment insurance programs, a day care center should carefully calculate the costs of insurance and the potential risks of self-insuring in order to make an intelligent decision about how to comply with the workman's compensation law.

Federal Occupational Safety and Health Act of 1970

Another recent federal law bearing on working conditions aims at providing basic health and safety protection in the workplace. The Occupational Safety and Health Act of 1970 (OSHA) requires that all employers, whether profit or not-for-profit organizations, provide a work environment free from any recognizable hazards that could cause death or serious harm. The regulations promulgated under this act are voluminous, but only a few apply to day care settings. The day care provider should obtain a copy of these standards by contacting the local office of The Occupational Safety and Health Administration of the United States Department of Labor. The standards that apply to centers cover such things as drinking water, exits, fire doors and

fire protection procedures, housekeeping procedures, lighting, lunchrooms, medical services and first aid, railings, sanitation, stairs, storage, trash, ventilation and wash facilities.

Where a center employs seven or more persons full- or part-time, OSHA requires that it keep certain records on forms available from the Administration office. Employee accidents must be reported and a supplementary report filed within six working days after learning of the accident. A summary report must be completed at the end of a calendar year. These reports are to be kept at the day care center, and do not have to be filed with OSHA unless that agency specifically requests them.

Employee Retirement and Income Security Act

If a center chooses to provide a welfare benefit plan (medical, surgical or hospital care benefits or benefits in the event of sickness, accident, disability, death or unemployment) or a pension benefit plan (retirement income or income deferred to the termination of employment or later), it may be subject to the provisions of the federal Employee Retirement and Income Security Act of 1974 (E.R.I.S.A.) In general the law regulates these types of plans by requiring reporting and disclosure of activities and establishing standards for the conduct of a plan administrator, called a "fiduciary". E.R.I.S.A. also gives employees certain rights including the right of appeal from a denial of benefits and rights to the "vesting" of benefits after a certain length of employment. (Benefits are "vested" when they become the property of the employee and cannot legally be taken away even if, for example, the employee quits work without good reason.) The law further regulates the funding and investments of plans and protects pension benefits when businesses fail or the plan terminates for other reasons.

Day care centers with pension plans will be subject to the reporting and disclosure requirements. They will not be subject in most cases to the requirements relating to welfare plans, because the administrative regulations exempt such plans where they cover fewer than 100 participants.

Day care centers have not participated in retirement programs in large numbers to date, preferring to rely on Social Security Act retirement benefits for their employees. Those benefits are now generally regarded as less than adequate for survival, however, and consequently there will be a growing need for substitute (in the case of a center which opts not to participate in F.I.C.A.) or supplemental retirement programs for day care workers. The responsiblities of the center choosing to adopt a plan, and of any organization from whom a retirement program is purchased will be set forth in E.R.I.S.A.

There are several types of programs from which to choose:

1. Under a regular pension plan employers contribute a percentage of the employee's salary to which the employee can add his or her own contribution and after a certain period of employment the employee comes to have a vested right in those contributions;

2. Under a Keogh Plan, available to partners and self-employed persons and their employees, up to 15% of income may be contributed each year, which income will not be taxed until it is used as retirement income. Benefits cannot be received until a participant is age 59 1/2 and must be taken by age 70-1/2;

3. Individual Retirement Annuities (IRAs) are available to persons not in a retirement plan. Participants contribute up to $1,500 per year which is not taxed until taken as retirement income. As under the Keogh Plan, benefits cannot be taken until age 59-1/2 and must be taken by age 70-1/2. Choosing an IRA is up to the employee, not the employer.

4. Employees of not-for-profit organizations with federal tax exempt status may participate in a tax deferred annuity. Under this plan, employers and employees contribute up to 20% of salary. The employee's contribution may be deducted from federal taxable income and some states' income taxes.

In selecting a program a day care center will need to consult with lawyers or accountants knowledgeable in the area to understand the advantages or disadvantages of each type of plan.

National Labor Relations Act

A subject which deserves book-length treatment in the area of wages, benefits and working conditions is that of management-union relations under the National Labor Relations Act (NLRA). Until recently the possibilities of labor organizing among day care workers seemed remote. Centers tend to be relatively small businesses with familial and service-oriented atmospheres. In the last few years, however, inflation has made the relatively low wage and benefits packages of day care employees seem even lower. Even in not-for-profit centers, employees have begun to seek the relatively stronger negotiating powers of collective bargaining. Sometimes in individual centers and often joining with workers in several centers, employees have begun to unionize in order to realize their rights under the NLRA and to insure that their economic

and other needs are advanced along with the program, equipment and other needs of the day care center.

Employees often become interested in joining a union when they feel they are being treated unfairly and when communications between them and the employer are poor. The center may lack a fair and effective procedure for resolving employee grievances; it may be ignoring employee input into matters of program or budget. Even where good relations exist, however, a local union drive to organize day care workers may succeed in your center together with others in the area.

The NLRA protects the rights of employees to engage in concerted activities for the purpose of collective bargaining, to organize, to bargain collectively and to refrain from these activities. It is illegal for an employer to discharge an employee or take other action against him or her where the purpose is to discourage the exercise of rights under the Act. This is not to say that an employee who happens to be a union organizer cannot be fired, but the reason for the firing cannot be his or her union activities; it must be an independent reason relating to his or her work at the center.

Under the NLRA, if 30% of the employees in a bargaining unit authorize a union to represent them in bargaining, the National Labor Relations Board (NLRB) will conduct an election. You may not lawfully interfere with the formation or administration of any union or contribute financial support to it. You may try to persuade your workers not to join a union, but you may not offer them any benefits or try to coerce them to vote against the union. This and other aspects of management-union law are sometimes difficult to apply in specific situations. Early in an organization drive you should consult with an attorney knowledgeable in the area of labor law to be certain any documents or oral communications you wish to use are lawful.

Once a union has become the bargaining agent for employees, a day care operator must confer and bargain in good faith and must not refuse to bargain collectively. Good faith bargaining does not mean that the center must agree to the union's proposals. Concessions are normally made by both sides in the course of bargaining.

As the employer, you should bargain as honestly and as openly as possible. If you claim that the center is financially unable to meet the Union's demands, the union has the right to see supporting documents such as balance sheets and profit and loss statements.

The agreement on each individual point should be written down before moving to the next point. The goal of bargaining is to enter a written agreement which is to govern employer-employee relations for a given period of time. If possible, you may want to associate with other day care centers in your area and bargain for an area-wide agreement. An advantage to this procedure is to gain the perspectives and insights of other centers in the negotiating process. Another is that one area-wide agreement helps to prevent a union from concentrating its bargaining on the center from which it can make the greatest gains, then using that agreement to pressure ("whipsaw") other centers to provide the same level of benefits.

The final written agreement may be a simple document that leaves details to be worked out in the everyday relationship. Usually, however, it will be more complex and address at least some issues in great detail. Clauses that ought to be present in a complete contract include the following: (1) conditions of recognition of the union. This should include such matters as whether union dues are to be paid by check-off (where you agree to deduct dues from paychecks and forward them to the union provided that the employee gives written, voluntary authorization); (2) Management clause. This is very important especially for the small day care employer so that disputes can be avoided about the employer's rights to make decisions concerning programs and other policies. An example of an existing management clause for one group of day care centers follows:

> Each Center shall have the right to determine its program and policies in accordance with policies established by the Agency for Child Development (H.R.A.) for reimbursement to Day Care agencies, and to retrench and reorganize its activities and staff at its discretion, and such decisions are not to be subject to the grievance procedure or to arbitration. Subject to the terms of this agreement, each Center shall also have the right to promulgate working rules and procedures; to hire, lay off, promote, assign duties to, transfer, discipline or dismiss employees; to carry out the customary functions of management; and to determine the extent and scope of each job and to make and change work assignments.

(3) Wages. You may wish to include this in a separate agreement if the contract provides for periodic review, since such a review will usually result in changes in wages; (4) Working conditions. This clause, or separate clauses, will typically cover vacations, holidays, sick leave, emergencies, jury

duty, leaves of absence and the like; (5) Health and Welfare. Often a contract will provide for you to deduct amounts from salaries and pay them in to union health and welfare funds. Under the Taft-Hartley Act, such sums must be used only for death, sickness, accident, retirement, medical and unemployment benefits. A fund must be administered jointly by the employer and the employees under a written agreement. You must have an employee's written authorization to make the deductions; (6) Grievance and Arbitration procedure. A must for every agreement, this clause should define what a grievance is (it usually does not include wage disputes) and set forth in detail the process for filing and resolving a grievance. Many contracts provide for arbitration as the final step of a grievance procedure. This means that when an appeal is taken, usually by the union, from the final in-center decision about a grievance, the issue can be submitted to an agreed-upon arbitrator whose decision will bind both parties; (7) Continuation clause. This should set forth an expiration date for the contract.

A NOTE ON PERSONNEL POLICY STATEMENTS

Even if your center is not unionized you should develop clear policies in all the areas that affect your employees' work, wages, benefits and discipline--basically including most of the elements that would be addressed in a fully-bargained union contract plus any details of work requirements you wish to communicate. In a small center with only a few employees you may not need an exhaustive manual to describe all these policies. As we suggest in Chapter IV, above, however, the larger the center, the greater the need to communicate your policies clearly and in writing.

Even in smaller centers it is important at least to set forth job descriptions in writing. It should be a concise statement that defines the employees' duties and responsibilities, the supervisory structure, the qualifications and salary and what the employee must do for advancement at the center. Such a document will serve several functions. The most important of these, of course, will be in evaluating an employee's performance on the job. The document will also be useful in advertising and interviewing candidates for vacant positions and will serve as a checklist together with the other job descriptions to be sure that all the tasks necessary to operate the center are covered. A job description may also be useful as evidence of the scope of an employee's responsibilities when a question of liability arises (see Chapter VI).

CHAPTER X

PERSONNEL LAW: ANTI-DISCRIMINATION

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7. Race, National Origin
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Chapter X

PERSONNEL LAW: ANTI-DISCRIMINATION

Directors of day care centers can easily become confused at the array of laws and regulations concerning employment discrimination. The major issue centers must face in this area concerns what is permissible and what prohibited in recruiting, hiring and terminating employees. It may seem that job discrimination and affirmative action obligations are fairly remote concerns for day care centers which, as a rule, employ more women and minorities than most small businesses. The fact is, however, that day care centers are no strangers to lawsuits and agency proceedings instigated by disgruntled ex-employees or unsuccessful applicants for employment.

PROTECTIONS AGAINST CLAIMS: PREVENTATIVE MEDICINE

The best protection against such claims by unsuccessful applicants is a solid understanding of the legal limits for questions employers may ask in the hiring process. Any employee who participates in that process should have in hand a written guide describing the do's and don'ts of screening. All involved in the process should be guided by one standard for all inquiries: namely, whether the information proposed to be sought is really necessary to evaluate an applicant's competence or qualifications to do the job s/he seeks. If the information is not necessary, then the inquiry should be omitted. We will discuss below several discrimination laws of which centers should be aware, and, in another section, some specific kinds of questions which can and cannot be raised in the hiring process.

The best protection against discrimination claims by terminated employees is the maintenance of a systematic program of employee discipline and careful documentation of an employee's history and the efforts to work out problems with that employee. If a center's records show there was just cause for dismissal and that proper procedures were followed, it will be well fortified against discrimination claims.

A system for discipline that day care employers should follow has developed in the area of personnel administration and labor relations. It is called "progressive discipline". The aim of this system is to foster rational

and open communication with an errant employee that leads by gradual steps to more severe disciplinary measures, culminating at last with termination, if necessary. When an employee does not meet the standards of his or her employment s/he should be promptly informed of this and help should be offered within reason to correct the employee's deficiencies. The supervisor should place in the file a memorandum briefly describing the problem and the steps taken; a copy of this should be given to the employee. Verbal warnings are usually sufficient at first, but if the problem persists a written warning should be given to the employee. If there is still no improvement, another memorandum to the employee should clearly state the consequences of not changing. Be sure such a written communication has been given before taking more severe disciplinary action. If there is still no improvement and you must terminate the employee, do it in writing and include the specific reasons for your action. Collect all your written records concerning the problem and keep them filed in one place in case the ex-employee raises a legal challenge to the termination.

Some types of misconduct at day care centers will, of course, call for immediate summary dismissal of an employee, e.g., striking a child, theft, use of drugs at the center, etc. If an employee must be terminated summarily, a letter of termination, again stating reasons specifically, should be sent as soon as possible and a record made for the files.

A SUMMARY OF THE MAJOR ANTI-DISCRIMINATION LAWS

The Civil Rights Act of 1969 Title VII (as amended by the Equal Employment Opportunity Act of 1972) is the major federal anti-discrimination law. It applies to all employers of 15 or more employees (thus, many day care centers) and prohibits discrimination against job applicants and employees because of race, color, religion, sex, or national origin in any term, condition or privilege of employment. Employers must post a notice describing how to file charges with the enforcing agency, the Equal Employment Opportunity Commission (EEOC) and must eliminate "artificial, arbitrary and unnecessary barriers to employment". Employers of 100 or more employees must file an annual report (EEO-1) of racial, national origin, and sex composition of employees by their occupational categories.

The EEOC will attempt to conciliate a discrimination charge made against an employer, but if that fails can commence a civil action in Federal court to enforce the law. Individuals and organizations acting on behalf of individuals may file charges with the EEOC. Job applicants and employees may also sue employers directly in court for alleged discriminatory acts or practices.

Employers found in violation may be ordered to make retroactive salary payments and to pay the claimant's attorney's fees and expenses as well as to submit to a court-ordered plan for changing employment practices to eliminate those with discriminatory effects.

Day care centers with 25 or more employees are subject also to the Federal Age Discrimination In Employment Act of 1967 (as amended by the Age Discrimination in Employment Act of 1978). This Act provides the same protections as the Civil Rights Act to persons age 40-70 in any area of employment.

Day care centers that are federal contractors or subcontractors are subject to several more anti-discrimination measures: (1) Executive Order 11246 (as amended by Executive Order 11375) requires affirmative action programs (discussed below) by all Federal contractors and subcontractors with contracts of $10,000 or more. Firms with contracts over $50,000 and 50 or more employees must develop and implement written programs to be monitored by a Federal compliance agency. The term "contracts" does not include "grants", but day care centers with Federal grants are well-advised to institute affirmative action programs voluntarily as a preventative measure against claims of discrimination.

(2) Federal contractors and subcontractors of $2,500 or more and Federal grant recipients are prohibited by the Rehabilitation Act of 1973 - Sections 503 and 504 from discriminating on the basis of handicaps and must institute affirmative action programs to employ and advance handicapped workers who are qualified.

(3) Vietnam Era Veterans' Readjustment Assistance Act of 1974 - Section 402. Federal contractors and subcontractors are prohibited under this law from discriminating in employment against qualified Vietnam Era veterans during the first four years after discharge and against qualified disabled Vietnam Era veterans throughout their work-life, if they have a 30% or greater disability. Affirmative action programs are also required under this law.

A NOTE ON AFFIRMATIVE ACTION PROGRAMS

As we have discussed, some day care centers are under legal obligation to establish affirmative action programs for women or minorities. Even if you are not required to have such a program, however, it may be good business policy to institute such measures.

In general, affirmative action programs entail identifying and changing employment practices which have discriminatory effects and taking positive steps to recruit and provide an accepting work environment for women and minorities. This means, among other things, that an employer cannot rely simply on word-of-mouth or walk-in applicants in recruiting personnel, since this practice tends to perpetuate the present make-up of a staff. If groups protected by the law are under-represented on the staff, the employer needs to advertise publicly and seek out minority candidates to overcome the appearance of discrimination. A center should in any case keep careful records of applicants and reasons why they were not hired, should any charges of discrimination be raised against them. A manual that day care centers may find helpful in setting up an affirmative action program is available from the United Stated Equal Employment Opportunity Commission, Washington, D.C. 20506, called Affirmative Action, A Guidebook for Employers, Vols. I and II.

PERMISSIBLE AND IMPERMISSIBLE QUESTIONS IN HIRING

Selection of employees is the most vulnerable point in the employment process for an employer concerned on the one hand to avoid discrimination while on the other to hire the most qualified candidates. As we have stated, a day care employer should not, as a rule, ask any question that cannot be justified as seeking information necessary to evaluate an applicant's qualifications or competence to do the job. This standard should in most cases satisfy what has come to be known in discrimination law as the "business necessity" test. Where an employment practice has a "disparate effect" on protected groups, the courts ask whether the employer can demonstrate a compelling "business necessity" for the practice and whether an alternative nondiscriminatory practice could achieve the required results. In general an employer can defend against discrimination charges based on a hiring inquiry if s/he can show (1) a "business necessity" for the inquiry, or (2) that despite the question no adverse employment decision was made based on the information, or (3) that the applicant was not qualified for the job on other grounds.

Some of the areas which day care employers may wish to inquire about include the following:

1. Physical or other qualifications. Regulations under the Federal Rehabilitation Act prohibit a federal contractor or grant recipient from asking applicants whether they are handicapped or about the severity of a handicap, but such employers may ask about the applicant's ability to perform specific job-related functions safely. They may also ask about handicaps if the questions are part of an affirmative action program or to remedy past discrimination.

A day care center may be concerned to hire employees capable of lifting children, playing with them, and generally sustaining the levels of energy necessary to care for children through a workday. These criteria may screen out some handicapped persons. Federal contractors or grant recipients and other centers subject to state laws prohibiting discrimination against handicapped persons, may have to justify such criteria on the basis of "business necessity". The question may arise whether it is actually necessary that every member of the staff satisfy the criteria in order to run the child care program. If not, your center may be required to modify its inquiries accordingly.

Concerning another physical criterion, a 1978 amendment to the Civil Rights Act makes it illegal to refuse to hire a woman on the ground of pregnancy or related medical conditions. Questions like, "Are you pregnant?", "Do you plan on having children?" and "List your dependents" and the like should be omitted.

It is also unlawful to use height or weight as job criteria unless they are demonstrably related to performance, since such criteria may discriminate against women, Hispanics and Asian-Americans.

2. Education and Training. Day care centers should, of course, ask questions necessary to determine whether an applicant is educationally qualified and competent to care for children. Courts have, however, struck down requirements of certain levels of education and training where there is no evidence that they significantly predict performance on the job and where they tend to exclude protected groups. The center should be certain that its education and training requirements are in fact related to the job it seeks to fill. This does not mean there must be a separate application form for each job, but that the center should scrutinize its educational and training requirements for job relatedness.

3. Criminal Records. Because arrest and conviction inquiries may have a disparate effect on minorities, they must be justified by business necessity under the Civil Rights Act. If a relationship can be shown between the behavior for which the applicant was convicted and his or her fitness to work in a child care center, a refusal to hire would probably be upheld. In day care hiring, a conviction for child-abuse would clearly fit this description but an arrest for shoplifting, years in the applicant's past, may not.

4. Age. It is permissible to ask about date of birth and age, but a day care center should be careful to guard against the use of such information to discriminate against employees or applicants.

5. Sex. Again, a center may ask about sex, marital status and the like, but since it is very difficult to show any relations between these areas and job performance, the employer should be prepared to show that the purpose of the question and the use to which it is put are not discriminatory. The Supreme Court has noted that hiring discrimination against women with pre-school children, and not men, would violate the Civil Rights Act.

6. Religion. An employer may generally not ask what religion an applicant is a member of, but may ask such questions as whether s/he would be available to work on Saturdays or Sundays. An employer must make reasonable accommodation to an employee's religious needs, but need not undertake costly shift changes and the like.

7. Race, National Origin. Questions in these areas are highly suspect unless the employer can show that they are asked in order to implement an affirmative action program or remedy past discrimination. Again, careful records should be kept. If an employer can show an improvement in the percentage of protected groups being hired or advanced, suspect questions and records showing an individual's race may be permitted as having an affirmative purpose. If a discriminatory pattern seems to persist or grow worse, however, such questions and records may be taken as evidence of a discriminatory employment practice.

8. Citizenship. Title VII does not cover alienage; accordingly, an employer may ask whether an applicant is a citizen as long as the information is not used to discriminate on the basis of race or national origin.

The fact that a person is an alien does not mean a day care center cannot hire him or her. Several classes of aliens are permitted under U.S. immigration laws to be employed in this country. In some cases the alien's permission to reside in the country may depend on their having suitable employment. You may ask to see an alien's 1-151 Alien Registration Card (permanent aliens) or their 1-94 Arrival-Departure Card or other "employment authorized" papers. If a day care center has questions in this area it should contact the U.S. Immigration and Naturalization Office. It is up to that agency, not private employers, to enforce these laws.

CONCLUSION

Our discussion of laws relating to personnel and the employer-employee relationship has necessarily been selective. A thorough understanding of any of the requirements and procedures we have discussed will require a day care operator to look at the laws themselves and explanatory materials from the agencies established to enforce them. Personnel law is also an area of rapid change, and information in a handbook like this one will soon be outdated. Our effort has been to highlight important areas and suggest the kinds of questions a day care employer should be considering in his or her employee relations.

Further reading that may be of help includes: Day Care Personnel Management, Southern Regional Education Board, 1979 (available from the Child Care Support Center, 1182 Peachtree Street, Atlanta, Georgia 30309); Loen, Ernest L., Personnel Management Guides for Small Business, Small Business Administration, Washington, D.C., 1974; and Webb, Stacie Jacob et al., Personnel Handbook for Day Care Centers Sponsoring Boards and Center Directors, Day Care Council of New York, Inc., 205 East 42nd Street, New York, New York, 10017, 1980.

CHAPTER XI

MEDICAL CARE AND TREATMENT

INTRODUCTION

THE MANAGEMENT OF EMERGENCIES RESULTING FROM SICKNESS AND ACCIDENTS

THE TREATMENT OF ILLNESS WHICH IS NOT OF AN EMERGENCY NATURE

ADMINISTRATION OF MEDICATION

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Chapter XI

MEDICAL CARE AND TREATMENT

INTRODUCTION

The area of medical care and treatment of children at day care centers is heavily regulated by state day care licensing requirements. These requirements commonly focus on four areas: (1) the management of emergencies resulting from sickness or accidents; (2) the treatment at the center of illness which is not of an emergency nature; (3) administration of medication; and (4) health requirements applicable to employees. The requirements in each of these areas are directed toward the basic goal of ensuring the health and safety of children while they are at the center.

As in the case of any legal obligation, failure to carry out these requirements in a proper manner involves potential legal consequences. The principal legal consequence is in the form of liability of the center and its employees for harm to children caused by negligence in responding to their health and safety needs. As in other areas of potential legal liability, such as in reporting (or failing to report) suspected cases of abuse or neglect (see Chapter XIII), written policies and procedures can prevent or greatly reduce the likelihood of such liability. The following discussion will highlight the key issues to be addressed in developing such policies and procedures in each of the four areas listed above.

THE MANAGEMENT OF EMERGENCIES RESULTING FROM SICKNESS OR ACCIDENTS

Emergencies are, by definition, unexpected. For this reason, the major focus of policies and procedures governing emergencies should be on ensuring that if an emergency occurs, the staff of the center will be able to respond quickly and effectively. As indicated earlier, licensing requirements for day care centers commonly specify a significant part of the content of such policies and procedures. Nevertheless, it is essential for a center to supplement these requirements where necessary so that it has an effective total system for responding to emergencies.

There are certain key elements which should be included in any system for handling emergencies at a day care center. The first is that the employees of the center must

be adequately trained to administer first aid. Related to this is the need to ensure that first aid supplies and equipment are readily available at the center. In addition, employees of the center should be fully informed of their responsibility to administer first aid and of the procedures which they must follow if first aid is necessary. This information should be made available to all employees and posted in conspicuous places throughout the center.

The second element which should be included in policies and procedures governing emergencies is a description of the steps which should be taken in the case of an emergency. These steps typically include at a minimum, first aid, contact with parents and contact with outside medical personnel. They may also include provision for transportation.

A clear system for involving parents in emergency cases is absolutely essential for sound management and for minimizing the potential for liability. It is also required by most licensing provisions. Parents should be involved in a number of ways. First, they should be notified immediately of an emergency and given the opportunity, if possible without endangering the health or safety of the child, to participate in the needed treatment by providing transportation and medical treatment. If this is not feasible, they should be asked to consent to transportation and medical care. Second, the center should have on file for each child a consent form which authorizes emergency medical treatment and transportation in the event the parents cannot be contacted when the emergency occurs.

There are several important reasons for involving parents in the ways indicated. The first is that, in general, the greater the involvement of parents in making decisions, providing care and transportation or consenting to care and transportation, the less is the exposure of the center to potential legal liability, since the center is doing fewer things which might be done incorrectly. The second is that, in general, the more that parents feel involved in and in control of the situation, the less they will feel that any mistakes made could have been avoided. The third is that hospitals and medical personnel will generally not treat a minor without parental consent. Thus, in many cases, immediate access to medical treatment is greatly facilitated by a consent form signed by the parents. A fourth reason already mentioned earlier is that such parental involvement is generally required by licensing provisions. A violation of such provisions greatly increases the likelihood of potential liability in the event of negligence which harms the child.

A consent form for medical treatment and transportation in situations of grave emergency or where parents cannot be located should be dated and signed by the parents. It should be as detailed as possible so that the consent is "informed", i.e., the parents are fully aware of the nature of the treatment or transportation for which the consent is given. It should also be updated periodically so that it is at least within the past six months. If the form satisfies all of these requirements, potential liability resulting from a misunderstanding will be greatly minimized.

The policies and procedures governing emergencies should be specific in indicating a physician or nurse who is available for consultation and a hospital where a child may be taken if necessary. They should also indicate procedures for transportation, including ambulance services, police and other outside forms of transportation which could be utilized.

One issue which commonly arises in the area of transportation is the extent to which employees' vehicles should be available. From the perspective of minimizing potential liability, it is best to use an official form of transportation such as an ambulance for the reason that the responsibility (and potential liability) for transporting the child safely is shifted to another party. Occasionally, however, the time lost in waiting for an official vehicle to arrive might jeopardize the health or safety of the child, and use of an employee's vehicle might be essential.

To minimize potential liability in this case, several actions can be taken. First, the cars of specific employees, such as that of the director and of other administrative personnel could be designated for use, limiting the potential for liability to a few employees. Second, this use could be described as a possibility in the consent form signed by the parents. Third, the role of transporting a child in an emergency could be written into an employee's job description or contract so that it is clearly "within the scope of his/her employment" for purposes of liability insurance covering acts performed in the scope of the employment. Fourth, the designated employees could be given additional liability insurance coverage, with the premiums paid for by the center.

THE TREATMENT OF ILLNESS WHICH IS NOT OF AN EMERGENCY NATURE

As in the case of the management of emergencies, the licensing regulations of most states require day care centers to establish written policies and procedures for the care of children who are ill but who do not require emergency

care. The content of these policies and procedures should be similar in many respects to that of the policies and procedures governing emergencies.

For example, parents should be notified of any illness and be given the opportunity to decide whether the child should go home. Also, transportation for this purpose should be provided by the parents, if possible. In addition, a parental consent form should be on file which authorizes routine medical treatment of a sick child by a nurse or physician. The use of this consent form should be supplemented by a conversation with the parents, if they are available.

The reasons for involving parents in the event of illness of a child are similar to those discussed above in relation to emergencies, except that the potential for liability is much less in the case of a child who is ill but who does not require emergency treatment.

As in the case of emergencies, the policies and procedures governing non-emergency illness should indicate a particular physician or nurse who is available for consultation. Also, if the child needs to be transported by someone other than the parents, alternative means of transportation should be specified. Of particular importance in the treatment of non-emergency illness is to have clear procedures for use in the center including the use of a quiet place where, if necessary, the child can rest, undisturbed by the activities of the center.

ADMINISTRATION OF MEDICATION

The administration of medication to children in emergencies, for non-emergency illness and for chronic conditions such as allergies is a contraversial area of child care which is commonly regulated by day care licensing requirements. One of the reasons why it is controversial is the large increase in the use of psychotropic drugs to manage the behavior of children. From the perspective of potential legal liability, the administration of medication involves an affirmative act by a child care provider which can alter the metabolism of a child in a way which is not always susceptible to immediate control.

It is particularly important, therefore, that before administering any kind of medication to a child, a day care center should be aware of the requirements of the licensing regulations and should incorporate those requirements into its policies and procedures. Also, as a general rule, medication,

whether of a prescription or non-prescription category (including such things as aspirin or cough medicine), should not be administered without the written order of a physician which authorizes the use of the medication for the particular child. In addition, no medication should be administered without the prior written consent of the parents. The nature and content of such a consent should be similar to that described above in the case of emergency treatment.

In addition to these orders and consents, a center should maintain a written record of the administration of medication to children which includes the time and date of each administration, the name of the staff member administering the medication and the name of the child. This is to ensure proper administration of medication and to provide evidence that the medication was administered as specified in case a question should arise. As a further precaution, all medication should be labelled with the child's name, the name of the drug and the directions for its administration. Drugs should be stored out of the reach of the children and unused portions should be returned to the parents or disposed of.

HEALTH REQUIREMENTS APPLICABLE TO EMPLOYEES

Typically, day care licensing regulations impose various health requirements on employees, particularly with regard to infectious diseases. Thus, it is generally required that staff members present evidence of the absence of tuberculosis, other communicable diseases and health problems which might impede their ability to work with young children. The reasons for these requirements are obvious and it is essential that day care centers be aware of them and make sure they are implemented initially in the case of new employees and, on a continuing basis in the case of existing employees.

MAINTENANCE OF RECORDS

It is essential that accurate and current records be kept in the area of health care and treatment. This is particularly critical in the treatment of emergencies and the administration of medication which are the two areas of health care particularly subject to potential liability. The maintenance of accurate and current records serves many purposes. From a management perspective, accurate and current records will reduce the likelihood of improper actions by employees resulting from ignorance of the history of the child's treatment. Such records will also reduce the likelihood of potential legal liability since mistakes will be more easily avoided if reliable information is available.

In the event of an investigation or court proceeding resulting from an emergency or accident, records of the center will become crucial evidence that the center and its employees acted properly. In this regard, personal diaries of employees who were involved in the handling of emergencies or accidents are very desirable as a future memory aid in the event that an employee is called upon to testify. One very useful procedure to consider is to have employees who are involved in responding to an emergency or accident write a report describing their participation. These reports can then be referred to at a later date if a controversy arises. The last chapter of this Handbook will discuss in greater detail the issues surrounding the maintenance of records at the center.

One other consideration should be added to this discussion of health records. The center should be aware of and have on file a medical history of each child, particularly in those cases where a child's medical condition might require special treatment on a regular basis or in emergency situations. One obvious example of this is a notation of any known allergies to medication. Other examples involve conditions, like diabetes or epilepsy, which the center should be aware of because they will determine the kind of treatment a child should be given in case of an emergency or illness. For purposes of potential legal liability, a center will be expected to be aware of such conditions and to respond appropriately to them.

CHAPTER XII

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Chapter XII

ISSUES RELATING TO CUSTODY

INTRODUCTION

Custody issues for day care centers arise most commonly in situations where someone other than the person who enrolled the child in the program claims the right to take the child out of the program during or at the end of a session and the center has no information on file which confirms that right. This happens most typically where two adults who were originally involved in the care of the child (e.g., as parents) are no longer living together but both assert a right to some degree of legal or physical custody of the child.

The situation also arises where the state has intervened to remove the legal and physical custody from a parent who nevertheless asserts a continuing right to visit the child and take the child home on an occasional basis. In this case of state custody, it is frequently a foster parent in conjunction with a social worker or other representative of the agency with custody who was originally responsible for enrolling the child at the center.

These custody disputes can become very complicated and emotionally charged. For this reason, it is essential that day care centers adopt clear policies and procedures for responding to these issues when they arise. The following discussion describes the legal concepts which it is useful to understand in order to develop such policies and procedures.

THE DEFINITION OF "CUSTODY"

From a legal perspective, there are two types of custody: "legal" and "physical". "Legal custody" refers to the right and responsibility of an individual or agency to make decisions on behalf of a child in matters such as education, medical treatment and place of residence. "Physical custody" refers to the right and responsibility of a person or agency to provide immediate care for the child. For example, where a husband and wife live together and place their child in a day care program, the parents have legal custody and the Center has physical custody while the child is in attendance. Similarly, where the state intervenes to protect a child who is at risk of being seriously injured as the result of abuse or neglect, a court will frequently grant legal custody to a state agency while giving physical custody

to a foster home. The difference between legal and physical custody and the fact that they can be divided and given to individuals and agencies (or programs) are concepts which are essential to keep in mind in sorting out the issues relating to custody which confront day care centers.

FAMILY SITUATIONS WHICH RESULT IN CUSTODY DISPUTES

There are a variety of family situations which are particularly likely to result in custody issues being raised. They will be described briefly in the discussion which follows.

Divorce and Legal Separation

The most typical situations which cause custody issues to arise are where the adults who were originally involved in the care of a child are divorced or separated. How clearly the custody issues have been resolved frequently depends upon the process which the adults followed in ending their relationship. For example, if a court has been involved in the divorce or separation, it is very likely that the right of legal and physical custody of the child has been given to one or the other of the parties through a divorce decree, an agreement incorporated into such a decree or a separation agreement where a divorce has not yet taken place. Increasingly, various forms of "joint custody agreements" are being entered into which sound as if they would be more complicated than the traditional "total custody" arrangements. Where a court has been involved, however, any potential complications should be minimized since the precise division of the rights and responsibilities of the parties will generally be set forth in a divorce decree or separation agreement.

Even if a court has not been involved in a separation of the parties, a written agreement commonly is entered into which defines the parties' rights to legal and physical custody of the child. Since this agreement is in the nature of a contract, it is considered to be binding on the parties.

In situations where a formal decree or agreement exists, it is generally possible to determine who has the right to legal and physical custody by referring to the terms of the decree or agreement. In these cases, therefore, where a person comes to the center and asserts the right to legal or physical custody of a child, it should be theoretically possible to determine whether the right exists as a matter of law. Whether such determination is desirable as a matter of policy is discussed later in this Chapter.

Informal Separation of the Child's Caretakers

Among the most complicated situations for determining the actual right to legal and physical custody of the child are those where the two adults originally involved in the care of the child subsequently separated without the involvement of a court or the benefit of a written agreement relating to child custody. Where the adults were married, their separation is of no legal consequence and both theoretically have equal rights to legal and physical custody even though, as a practical matter, the children are living with only one of them. Where there was no marriage, the law is unclear regarding the right to legal and physical custody, although traditionally it has been assumed that the mother has the right to both. In states which recognize common law marriages if certain conditions are met (such as living together for a certain period of time), an informal living arrangement may result in a common law marriage under which the rights of the two parties are similar to those conferred by a formal marriage (i.e., both parents have equal rights to legal and physical custody of children).

Custody of a Child by a State Agency ("Wards of the State")

Where a court has intervened in a family to protect a child in a case of abuse or neglect, it should generally be clear from the order of the court who has been given the legal and physical custody of the child (frequently referred to as a "ward of the state"). Since this is the most common situation where the legal and physical custody of a child are separated from each other, this area can be quite complex.

There are two general custody arrangements which are made in these cases. The first is where legal custody is given to a state agency and physical custody remains with the family where the child has been living (e.g., the parents). In this case, the extent to which the family is permitted to make decisions about the child is governed by the agency with legal custody. This will vary from state to state and case to case. Therefore, it will be a particularly difficult area to be able to determine who has the legal authority to act on behalf of the child in a given situation, although the issue of physical custody (i.e., who can take the child home) should generally be easy to resolve, since the child is living with the family.

The second custody arrangement has the potential for being far more complicated because it involves more parties. This is where the court grants legal custody to a state agency, physical custody to a foster family and "visitation privileges" to the parent from whom legal custody has

been removed. One issue which must be answered on a case-by-case basis is the extent to which the parent who has lost custody has been given the right to visitation or to "occasional custody" in the form of weekend or overnight visits or similar arrangements. Another issue is the extent to which the designee of the agency with legal custody, e.g., a social worker, is authorized to take physical custody of the child.

Another issue of a general nature which varies from state to state is the extent to which foster parents are given some of the rights and responsibilities associated with legal custody, in addition to the right of physical custody which they are normally given. For example, foster parents are sometimes authorized to make educational and medical decisions on behalf of a child. Also, some foster homes are viewed as "pre-adoptive homes" which may place them in a different status from "temporary foster homes".

IMPLICATIONS FOR DAY CARE CENTERS

Although, based upon the above analysis, it may be possible theoretically for a day care center to determine in most cases who actually has the right to the legal and physical custody of a child, such an effort would generally be impractical and undesirable. When faced with an irate adult claiming the right to physical and legal custody of a child, a center must act quickly and decisively to protect the child and cannot undertake the complex process of decision-making or enforcement of rights which are usually the specialty of courts. Nor in most cases, can a center act as a mediator or counsellor between warring parents.

The only practical recourse left, therefore, is for the center to have clear policies and procedures to apply to each situation as it arises and to act on the basis of information on file at the center which has been collected in accordance with those policies and procedures. After the immediate crisis is over, the center can insist that the person who enrolled the child clarify the custody arrangement through a court proceeding or other means.

Suggested Policies for Responding to Custody Disputes

An essential component of a policy in this area is to clarify the status of a child's custody with the person enrolling the child at or prior to the time of enrollment. This information should be put in writing and retained by the center on a form which is signed by such person and dated. In addition to a statement of who has legal and physical custody of the child, the form should specify the names (with

addresses and phone numbers) and relationships to the child of those persons who are authorized to pick up the child at the center.

If the person enrolling the child indicates that there is a custody arrangement or agreement, this should be spelled out on the form, and supporting documentation such as a court decree or separation agreement should be asked for and attached to the form. In the case of children who are "wards of the state" (i.e., in the legal custody of a state agency) it would be particularly desirable to have a copy of the court order and some supplementary information on the custody arrangement from the agency with legal custody.

Although as a general rule the center cannot and should not undertake its own investigation in a custody dispute, documentation on file can enable the center to act with greater conviction and forcefulness in refusing to give a child to an adult who claims a right to custody, but who is not listed on the enrollment form as someone authorized to take the child. Also, documentation can be useful to confirm what the person enrolling the child has said or to clarify it in cases where that person is confused about the arrangement.

Another crucial component of a policy in this area is a statement which should be given to all persons enrolling children at the center which specifies that a child will be released only to those persons named on the enrollment form as being authorized to receive the child. This statement should make clear that the center will not undertake to decide who has legal and physical custody of the child if a dispute should arise, but will rely on the information provided by the enrolling person.

A policy on custody conflicts should also include provision for updating the custody information on the enrollment form since custody arrangements are frequently modified by agreement of the parties or court order. In all cases where the custody information is revised, the revision should be dated and signed again by the enrolling person so that it is clear that that person agrees to the change.

Suggested Procedures in the Case of a Custody Dispute

Assuming a situation where an adult who is not authorized on the enrollment form to take the child arrives at the center and demands to remove the child, the center must have clear procedures in place so that it can respond effectively. The first step should be to inform the person that the center cannot give a child to an unauthorized person, no matter what that person's theoretical rights may be. It

would be desirable at this point to present the person with a copy of the policy recommended above (regarding release of the child to authorized persons only) so that it is clear that the center is not responding selectively, but is acting according to a general policy.

If the person leaves at this point, it is important to notify the person who enrolled the child that someone has arrived at the center and demanded to take the child. If necessary, this notification should be followed by a meeting to clarify the situation so that a similar incident does not recur.

If the person demanding custody refuses to leave and becomes belligerant, the program director should consider involving the police. A decision to involve the police requires a judgment which must be made in each case, based upon the perceived need to protect the staff and children in the program. A procedure for protecting the particular child in question by removing him/her from the center should be in place in the case of a potentially violent and dangerous situation.

THE RELATIONSHIP OF CUSTODY ISSUES TO CONSENT FOR MEDICAL TREATMENT AND OTHER FORMS OF CONSENT

The preceding Chapter on Medical Care and Treatment refers to various consent forms which a center should have on file. Obviously, it is intended that these forms be signed by a person who has the legal authority to act on behalf of the child. The resolution of the custody issues described in this Chapter will frequently determine who has such authority. Ideally, this should be clarified at or before the time of enrollment when the issue of who is authorized to take the child is clarified. As in the case of the authority to take the child, however, the center must ultimately rely on the word of the person enrolling the child that that person has the legal authority to consent on behalf of the child.

LATENESS IN PICKING UP THE CHILD

An issue which is technically related to the area of custody but which is really quite separate concerns situations where the person who picks up the child arrives late. In this case the center continues to have physical custody of the child even though the session has ended. As a matter of law, the center's responsibility for the care and safety of the child continues until the child is picked up by an authorized person. However, it is usually not a good idea to take

the child to the home of a staff member without the parent's prior authorization. If a center is forced with this situation and has no prior policy to cover it, the center should inform the local police before taking the child anywhere. The central rule to avoid liability in this area is to stay at the center with the child until an authorized person picks him/her up.

A chronic problem of lateness or several incidents of persons arriving very late (e.g., more than hour) to pick up the child must be dealt with as serious matters which jeopardize the center's ability to have the child in the program. If the problem is a particularly serious one, it may be appropriate for a report of neglect to be made under the state's child abuse and neglect reporting statute. This option is discussed in greater detail in Chapter XIII on Responding to Suspected Cases of Child Abuse and Neglect.

CHAPTER XIII

RESPONDING TO SUSPECTED CASES OF CHILD ABUSE AND NEGLECT

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OVERVIEW OF THE PROVISIONS OF THE REPORTING LAWS

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- Legal Protection of Reporters: Immunity From Liability
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Chapter XIII

RESPONDING TO SUSPECTED CASES OF CHILD ABUSE AND NEGLECT

BACKGROUND

Concern about the incidence of child abuse and neglect during the past several decades has resulted in the passage of child abuse and neglect "reporting laws" by all of the states. During the mid-1960s when all of these laws were first enacted, the reporting requirements were directed primarily toward the identification in hospitals and other medical settings of physical abuse of children brought in for treatment of injuries. As a result, doctors and other medical personnel were generally the only professionals required by law to report suspected cases of child abuse.

Heightened social awareness of the problem of mistreatment of children by their caretakers in conjunction with an increased concern for the rights of children during the past two decades, resulted in a rapid expansion of the definition of abuse in most state reporting laws to include sexual abuse and various forms and degrees of neglect. With this expansion of the kinds of reportable cases come an increase in the efforts of state lawmakers to specify additional settings where abuse and neglect would be most likely to be identified. These efforts took the form of a broadening of the types of professionals mandated by law to report suspected cases of abuse and neglect.

Thus, child abuse and neglect reporting statutes now commonly include among the list of "mandated reporters" professionals such as educational administrators, teachers, guidance counselors and social workers in addition to the doctors and other medical personnel who were listed in the early statutes. All of these medical and non-medical personnel have in common the fact that their professional roles regularly bring them into contact with children and their families. "Child care providers" are frequently included as mandated reporters either explicitly or within other categories of mandated reporters such as "teachers" or "other persons". Since the law typically makes no distinction between professionals working in public or private settings, all professionals in a particular category are required to report regardless of their employers' public or private status or of the source of the funding for their agency.

Even if in a particular state child care providers are not included within any category of mandated reporters, many reporting laws authorize voluntary reports to be made by

non-mandated reporters. This fact, combined with considerations of professional responsibility and ethics to which most professionals are subject, makes reporting of suspected cases of abuse or neglect something which must be seriously considered even by professionals who technically are not mandated reporters.

Aside from including day care providers within the terms of their child abuse and neglect reporting laws, a number of states now provide in their licensing regulations for day care centers a requirement that a center have written policies and procedures to govern the handling by employees of the center of suspected cases of abuse and neglect. These licensing requirements underscore the fact that it is imperative for the operators of day care centers to be fully aware of the requirements of the child abuse and neglect reporting laws in their respective states and to have written policies and procedures which reflect that awareness.

OVERVIEW OF THE PROVISIONS OF THE REPORTING LAWS

Unlike the area of special education which is subject to a federal law (P.L. 94-142: "The Education of All Handicapped Children Act"), the area of child abuse and neglect is controlled almost completely by state law (the word "almost" is used because the federal government, through grants under P.L. 93-247: "The Child Abuse Prevention and Treatment Act", exerts some influence over the content of state reporting statutes by requiring as a condition for a grant award to a state, that the state's reporting statute satisfy specified standards). Despite the fact that all of the states have unique child abuse and neglect reporting laws, however, there is a sufficient degree of uniformity in the basic structure and approach of the laws to permit some useful generalizations about their content and their importance in the daily operation of day care centers. The following discussion will focus on the most important provisions of these laws from the perspective of day care centers.

The Mandated Reporters; Who Must Report?

As indicated earlier in this chapter, the list of mandated reporters in a particular child abuse and neglect law reflects an effort by lawmakers to ensure that suspected cases of child abuse and neglect will be identified in settings where professionals, in the course of their work, regularly came into contact with children and their families. The list varies from state to state depending upon how inclusive the legislative sponsors want it to be. For day care centers, therefore, the first question concerns the extent to which employees of the center are required by law to report

suspected cases of abuse and neglect. For example, the center must determine how many employees are mandated reporters and how many are authorized to report voluntarily. A related question concerns the extent to which employees of the center who are non-mandated reporters under the reporting law are nevertheless obliged to report because of requirements in a professional code of ethics or in a less formal statement of professional responsibility. As will become clear in a later section of this Chapter, the answers to these questions are important in developing the center's policies and procedures for the handling of suspected cases of abuse and neglect.

Legal Protection Of Reporters: Immunity From Liability

Aside from the obvious difference in legal responsibility between mandated and voluntary reporters, the reporting laws generally differentiate between the two in the degree of immunity from liability which is given to each type of reporter. Thus, in order to encourage mandated reporters to report, state reporting laws commonly provide them with an absolute or qualified immunity from civil and criminal penalties. A grant of absolute immunity is typically phrased in the following manner: "no person so required to report shall be liable in any civil or criminal action by reason of such report". A qualified immunity is worded in a similar manner expect for the addition of a conditional clause such as the following: "so long as such report is made in good faith". The practical difference between the two is that an absolute immunity precludes the filing of any legal action against the reporter while a qualified immunity allows a reporter to be sued but places a much heavier than normal burden on the party suing to prove his/her case. Thus, for example, a reporter with a qualified immunity cannot be successfully sued for ordinary negligence in making or failing to make the report. Instead, the party suing must prove "actual malice" or recklessness amounting to malice.

Voluntary reporters, on the other hand, are generally not provided with any immunity or, less frequently, are given the qualified immunity just described. Where no immunity is given, the person reporting is liable for ordinary negligence in making the report, regardless of whether the report was made in good faith. The most common reason for denying any immunity to a voluntary reporter or for granting only a qualified immunity to a voluntary or a mandated reporter, is the concern that a broader grant of immunity might result in an increase in reports which are frivolous or malicious.

Legal Penalties For Not Reporting: Fines, Civil Liability and Professional Consequences

There are three types of legal liability which might be imposed upon a mandated reporter who improperly fails to report a suspected case of abuse or neglect (voluntary reporters are subject to a different degree of potential liability which is described below). The first is a criminal penalty, usually in the form of a fine. Initially, when the requirements of the reporting laws were new and not generally known to the mandated reporters, there were no criminal penalties for not reporting. Now that the reporting requirements have become common knowledge among the mandated reporters, however, an increasing number of states have added criminal penalties for an improper failure to report.

The second type of liability is a civil judgment in the form of money damages on behalf of a child who was injured as the result of the negligent failure of a mandated reporter to report a suspected case of abuse or neglect. A court proceeding leading to such a judgment would be brought by a representative of the child such as a parent, other relative or legal guardian, since the child, as a minor, does not have the legal capacity to sue.

Generally, in a civil proceeding for money damages based upon the negligence of another person, the party bringing the suit has to prove three things: (1) that the defendant was negligent (i.e., that a "reasonable professional" under the same circumstances would have reported); (2) that this negligence was a direct cause of the later injury (i.e., the injury to the child probably would not have occurred if the report had been made); and (3) that an injury actually occurred. Once the first element of the case is proved in an action against a mandated reporter, the other two are relatively easy to demonstrate. With regard to the first element, a negligent failure to report, a finding of criminal liability (which must be proved "beyond a reasonable doubt") would be sufficient in itself to support a finding of negligence (which must be proved by a "preponderance of the evidence", i.e., 51% of the evidence).

The third type of liability for improper failure to report is not specifically referred to in the reporting laws but is nevertheless of considerable concern. This is the potential for consequences of a professional nature including loss of job for improper conduct and loss of license or professional reprimand for violation of a professional code of ethics or a professional licensing requirement. Although the actual cases of these professional consequences are few in number, they will undoubtedly increase since the courts increasingly are holding professionals to a higher standard of conduct in reporting suspected cases of abuse and neglect.

Non-mandated reporters may also be subject to potential liability for failure to report even though no criminal sanction can be imposed upon them. This might occur where the non-mandated reporter is subject to requirements of professional responsibility or ethics or procedures adopted by his/her employer. Violation of such responsibility or procedure might be the basis for a civil action for damages on behalf of an injured child or for the professional consequences for improper conduct discussed in the preceding paragraph.

Another area of liability which is specific to the day care center rather than to its employees relates to the failure of a center to have or to properly implement policies and procedures for the handling of suspected cases of abuse or neglect. This will be discussed in more detail in a later section of this Chapter.

Waiver of the Client's Right To Privileged Communications

Another common feature of child abuse and neglect reporting laws is that which eliminates the protection given to communications between clients and certain professionals. These "privileged communications" are created by laws and professional codes of ethics and generally prohibit certain professionals, such as doctors and lawyers, from revealing information given to them in their professional capacity by a client if the client does not want the information to be revealed (the "privilege" is the client's). A similar privilege frequently governs the marital relationship and allows one spouse to refuse to allow the other to reveal communications made in the marital relationship.

These privileges, which are designed to protect the confidential nature and sanctity of the relationships to which they apply, are commonly waived by child abuse and neglect reporting laws. This is because state lawmakers have decided that the policies underlying the privileges are outweighed by the need to secure information in cases where it is extremely difficult to develop evidence of abuse or neglect because the victim is too young or traumatized to be able to provide such evidence.

The Definition Of A Reportable Case

Most reporting laws define a reportable case in general terms such as "inflicted physical injury" or "neglect" and qualify these terms with words such as "severe" to make clear that generally, the concern of the law is with the intentional infliction of serious harm (by act or omission)

of a physical or psychological nature and not with "milder" cases of injury caused by acts which are considered to be within "the normal range of accepted discipline".

In addition to this attempt at an objective standard for defining abuse or neglect, all statutes include an express or implied subjective standard of "professional judgment" which gives potential reporters wide discretion in deciding whether to report a particular case. Thus, the total standard for what constitutes a reportable case is a blend of "objective" and "subjective" considerations.

IMPLICATIONS FOR DAY CARE CENTERS

Several legal implications for day care centers flow from the legal requirements described above. First, a center must enable its employees to fulfill their legal responsibilities under a reporting law or, in the case of non-mandated reporters, under a professional code of ethics or similar statement of professional responsibility. Second, a center must be able to hold its employees accountable for negligence or improper conduct in either making a report or failing to report. Third, a center must protect itself from civil liability (i.e., money damages) for inappropriate intervention or failure to intervene. Such liability might arise on behalf of an injured child or of a caretaker who feels wrongfully accused of abuse or neglect and sues for defamation of character (e.g., libel or slander) or other forms of personal or financial injury.

In addition to its legal responsibilities and its obvious need to protect itself and its employees from potential liability, a center must also consider the need to establish sound management practices and to promote "ethical" behavior by its employees. Although these considerations are not technically legal in nature, they obviously can go a long way toward preventing unwanted legal consequences. In general, an excellent management system coupled with high standards of ethical conduct will tend to satisfy or exceed any legal requirements.

The Need For Written Policies And Procedures

The best way for a center to respond to the legal, management and ethical requirements which flow from child abuse and neglect reporting laws is to have written policies and procedures which describe the reporting requirements of employees of the center and establish an internal process for responding to those requirements. Such policies and procedures will give employees the guidance which they need,

reducing the probability of error in the handling of a suspected case of abuse or neglect and enabling the center as an employer to hold its employees accountable for improper conduct. They will also reduce the likelihood of potential liability toward an injured child or "wronged" caretaker. This is because the best defense against a civil action for money damages based on alleged negligence is the presence of written policies and procedures which satisfy legal requirements and evidence that these policies and procedures are carried out generally and were followed in fact in the case at issue.

The Content Of Written Policies And Procedures

There are certain basic elements which should be part of any written policy and procedures on reporting suspected cases of abuse or neglect. The first is a clear description of the legal, professional and programmatic (i.e., the center's own requirements independent of external requirements) responsibility of employees to report. This should indicate who the mandated and voluntary reporters are and the various immunities from liability, penalties and waivers of privileged communications which apply to them.

A second element should be as clear a statement as possible of the definition of a reportable case of abuse or neglect, based upon the language of the reporting law, court interpretations of that language and guidelines from the agency to which the report must be made. Frequently, assistance with this aspect of the policy and procedures (as well as others) is available from various public and private agencies at the state and federal levels which provide technical assistance in the area of child abuse and neglect. Particularly useful information from those sources could be appended to the policies and procedures or otherwise distributed to all employees.

A third essential element is a description of the internal process for deciding whether to report a suspected case of abuse or neglect and how a report should be made. An initial consideration in developing this description is to decide who should be involved in making a decision on whether to report a particular case. For example, the decision to report could be left to one person or could be made the result of a team effort, as in the case of the "trauma teams" which have been created for this purpose in many hospitals. Another variation would be to have a potential reporter meet with the director of the center or his/her designee.

Once it is decided who will make the decision, the next element to include is a statment of who will make the

report. For example, some reporting laws state that an employee of a facility such as a hospital may report to an administrator who may make the official report on behalf of the facility. Even if such a procedure is not specified in a state law, it could be incorporated in a center's procedures as a way of facilitating the proper management of suspected causes of abuse or neglect.

Another related consideration in developing procedures for reporting relates to the immunity from liability generally given to mandated reporters and commonly denied to voluntary reporters. If such a distinction is made in a particular state, it might be desirable to provide in the procedures that only mandated reporters in the center will actually make reports. This will reduce the potential for liability in the event of an improper report.

Since the reporting of a suspected case of abuse or neglect is obviously a very serious and delicate matter with regard to the child's caretaker, the procedures should provide for the possibility of contacting the child's caretaker prior to making a report, if this is considered desirable and not dangerous to the child. Conversely, if the child is considered to be subject to an immediate risk of being injured or otherwise harmed, provision should be made for an immediate report and temporary removal of the child to a safe place until the agency receiving the report (or the police) can arrive to take physical custody of the child.

In anticipation of future court appearances if the report results in a court proceeding or in threats of civil action by an indignant caretaker, it is essential that careful records be kept of everything related to the report. Although the question of what to include in records will be discussed in detail in a later chapter, several points should be emphasized here. First, all official records should be factual in nature and should avoid stating conclusions which are not clearly based on facts. Second, gratuitous statements about the personality of the child or caretaker should be avoided unless they are factual since they could become the basis for a claim of defamation of character. Third, employees involved in a case which is likely to be reported should maintain detailed personal notes as a memory aid. This kind of personal diary is generally exempt from requirements giving parents and others access to information about the child.

A final section which should be included in the description of procedures is one which gives all employees an overview of the state system for handling reports of abuse and neglect. Thus, for example, the procedures should describe the agency to which the report goes, the kinds of actions

which that agency is likely to take and any potential future involvement of the employees of the center who were involved with making the report. Such future involvement might include being a witness in a court proceeding to determine how the case should be handled over the long term. This kind of overview should give employees a sense of their roles in the total system and, hopefully, will allay concerns about being involved with particular cases.

CHAPTER XIV

SERVING HANDICAPPED CHILDREN

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SERVING HANDICAPPED CHILDREN

INTRODUCTION

During the past decade, two major federal laws have been passed to assist handicapped persons in gaining access to a variety of publicly financed services, such as education. The first of these, Section 504 of the Rehabilitation Act of 1973, prohibits discrimination on the basis of handicap by any program that "receives or benefits from" federal financial assistance from the Department of Health and Human Services (Regs. for Section 504, paragraph 84.2). The second, P. L. 94-142 ("The Education of All Handicapped Children Act"), requires that a free, appropriate and publicly financed education be provided to handicapped children within a specified age range. This range includes children from age three if such inclusion of three, four and five year olds is not "inconsistent with state law or practice or the order of any court, respecting public education [for that age group] in the state" (Regs. for P.L. 94-142, section 121a.122). As a result of this law, many states are now providing services for this group of "pre-school age" children.

The federal regulations for both of these laws were issued in mid-1977 so that, as a practical matter, these laws have been vigorously implemented only during the past three to four years, although a certain amount of planning at the federal and state levels occurred prior to that time, after the enactment of these laws by Congress. These laws and their regulations and the efforts on behalf of handicapped people which caused them to be enacted are reflected in general terms in the recently approved (March 12, 1980) Day Care Regulations of the Department of Health and Human Services (referred to in this Chapter as DHHS). They are also reflected more specifically in the day care licensing regulations of many states and in the laws and regulations governing special education in all of the states.

Although the federal laws and regulations are too new to allow for any accurate determination of their total impact on day care centers, certain effects are clear. The first is that one of the laws, P.L. 94-142 is a "funding law" which is a potential source of funds for day care centers who wish to serve handicapped children and are located in states which include three, four and five year olds in the group of children entitled to receive a publicly financed education. Even if this age group is not included in a particular state, every state must provide for payment for some services in

private day educational programs for children up to age eighteen (and through twenty-one if the state includes the age group from eighteen through twenty-one). Thus, funding may be available for a center which chooses to provide an educational program for this older age group.

A second effect which is more legal in nature is that centers which receive any financial assistance which originates from DHHS must make their programs accessible to handicapped persons and otherwise comply with the requirements of Section 504 of the Rehabilitation Act of 1973, referred to above. In addition, centers which receive public funds for the provision of special education must conform to the applicable requirements of P.L. 94-142 and its counterpart in state law.

The legal implications of these federal and state laws and regulations for day care centers will vary depending upon the source of a center's funding. For this reason, the analysis which follows divides centers into three categories: (1) those which do not receive financial assistance from DHHS; (2) those which receive financial assistance from DHHS but do not receive public funds for the provision of special education; and (3) those which receive public funds for the provision of special education as a part of their total funding. In addition, this Chapter will include a general comment at the end on the legal issues peculiar to centers which serve handicapped children, regardless of the source of funding for the center.

Centers Which Do Not Receive Financial Assistance From DHHS Or From Public Funds For The Provision Of Special Education

The first category of day care centers is subject to the least regulation by federal and state law. In general, centers in this category are subject only to those provisions concerning handicapped children which might be contained in the state licensing regulations for day care centers. In addition, they may be subject to various requirements concerning the handicapped which are in special state laws governing the removal of architectural barriers or in local permit ordinances and codes concerned about the health and safety of handicapped persons in premises for which various permits are issued. The degree and applicability of these kinds of requirements will vary from state to state and in some cases from locality to locality within a state.

Since the licensing requirements apply to all day care centers regardless of their source of funding, even centers which are funded totally from private sources must comply with them. This is also true for the special state laws and permit requirements which might exist.

An example of the type of licensing regulation which a center may encounter in this area is one which requires the center to evaluate, provide a program and otherwise adapt its program to the needs of a child at the center who is identified as having a substantial likelihood of being handicapped. If such a child is at or above the age when publicly financed special education is supposed to be provided under federal and state law, the regulation may require a center to refer the child to a public educational program for purposes of an evaluation preliminary to public financing.

Similarly, there may be a requirement that a center notify local school systems when any handicapped child served by the center is about to reach the age of entitlement to a publicly financed education so that advance planning may take place. Most of these kinds of requirements are designed to coordinate services at the center with publicly financed services under the state special education law.

Another type of provision which may be found in licensing regulations requires a center to meet special standards with regard to staffing and program accessibility in addition to the regular licensing standards if the center wants to admit handicapped children. This kind of provision reflects an effort by the licensing agency to regulate services for handicapped children in cases where there would be no other form of regulation because the source of the center's funding is private.

Centers Which Receive Financial Assistance From DHHS But Do Not Receive Public Funds For The Provision Of Special Education

A center which receives financial assistance from DHHS automatically becomes subject to the requirements of Section 504 of the Rehabilitation Act of 1973 and its regulations. This type of center is also subject to the requirements applicable to the first category of centers described above since all centers are subject to those requirements. In addition, if a center receives funding from any of the sources listed in Section 71-2 of Subpart A of the Day Care Regulations of DHHS, it will be subject to the few general provisions in those Regulations which relate to handicapped children (see, however, the note on p. 112, supra). These sources include, for example, Titles IV-A and B and Title XX of the Social Security Act.

The Regulations for Section 504 provide with regard to a "preschool education or day care program or activity" which is subject to the Act that it "may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of

such persons in determining the aid, benefits or services to be provided under the program or activity". The precise meaning of this clause is unclear and is still being interpreted by the courts in individual cases. At a minimum, however, it probably requires a program to ensure physical access and to have a program design which is responsive to the needs of a handicapped person. The issue which is being hotly contested, mainly in the area of higher education, is the extent to which a program must adapt itself and spend funds to meet this type of requirement. For example, one case pending before the United States Supreme Court raises the issue of whether a deaf student must be provided with an interpreter at an institution of higher education.

The Day Care Regulations of DHHS are fewer and far more general than the regulations for Section 504. The Day Care Regulations require that day care centers to which the regulations apply shall include in a written plan of services "a description of activities children engage in and how those activities meet their developmental needs, including the special needs of children in the center who are multilingual or handicapped". Also, the State Agency responsible for federal day care funds is required to include within its statewide plan for training of day care providers the subject of "day care for handicapped children".

Centers Which Receive Public Funds For The Provision of Special Education As Part Of Their Total Funding

This category of centers is subject to the requirements discussed above for the first category of centers and those which apply to the second category if, in addition to receiving public funds for the provision of special education, they also receive financial assistance from DHHS. Because they receive public funds for the provision of special education, they are also subject to the requirements of P.L. 94-142 and its state counterpart.

These special education laws require an extensive array of procedural and programmatic elements but they are primarily oriented toward public school programs. Private programs are less regulated, but nevertheless must satisfy a substantial number of requirements. Depending on the special education law of a particular state and on its day care licensing regulations, these requirements might involve only the licensing agency or they may also involve a special education agency. To some extent, this may be determined by the proportion of handicapped children in a program.

Typical requirements which must be met by a center which receives public funds for serving handicapped children are: (1) additional licensing or approval either by the licensing agency or a special education agency; (2) a liaison arrangement with the public sector for purposes of monitoring the child's progress; (3) special staffing requirements; (4) extensive involvement of parents in decisions about the child's program; (5) special requirements relating to maintenance of pupil records, which will be discussed further in the next chapter; (6) periodic reviews and reports to the parents and to a public agency, such as a local school system; (7) involvement in periodic evaluations of the child; and (8) special requirements with regard to facility, equipment and transportation. In general, the requirements reflect an effort to hold private programs to standards which are roughly equivalent to those which public programs must satisfy and to establish an effective system for monitoring compliance.

Legal Issues Peculiar to Centers Which Serve Handicapped Children

The legal standard of care to which all day care centers are subject in providing for the health and safety of handicapped children is similar in most respects to that described in preceding chapters in relation to other children served by the center (e.g., emergency health care must be available, child abuse and neglect must be reported, consent forms from parents must be on file, and so forth). There are three areas of difference, however, which result from the fact that a child is handicapped.

The first is that many procedures which apply to non-handicapped children will have to be adapted to the needs of a handicapped child. For example, consent forms for the use of transportation may have to be tailored to a particular vehicle. In general, the program will have to incorporate those adaptations which are required because of the nature of the child's handicapping condition.

The second difference results from the assumption that if a child is handicapped, he/she will be more susceptible to being injured in situations where ordinary standards of care are applied. Thus, for purposes of potential legal liability for negligence, the center will be held to a higher standard of care than usual in serving handicapped children.

The third difference, related to the second, results from the additional licensing and other requirements which will generally apply to a center which services handicapped children, particularly if it receives public funds. The very

existence of these additional requirements increases the possibility of negligence and, therefore, subjects the center to a higher standard of care than usual.

CHAPTER XV

MAINTENANCE OF RECORDS AND THE RIGHT TO PRIVACY

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BASIC RULES GOVERNING THE MAINTENANCE OF RECORDS

BUSINESS RECORDS

PERSONNEL RECORDS

RECORDS ABOUT THE CHILDREN AND THEIR FAMILIES

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MAINTENANCE OF RECORDS AND THE RIGHT TO PRIVACY

INTRODUCTION

Day care licensing regulations commonly include requirements relating to the maintenance of records at the center. If a center receives public funds for the provision of special education, it will also be subject to federal and state laws and regulations which include requirements relating to the maintenance of educational records. In addition, there are some basic rules of law and common sense which apply to this area.

This Chapter will review some basic principles which should be the basis for a system of record-keeping and will then analyze those principles in relation to the three main categories of records maintained by day care center: (1) business records; (2) personnel records; and (3) records about the children and families served by the center. This analysis will refer to applicable federal and state laws. The final section of this Chapter will discuss the general right to privacy which should be guaranteed to the children and families served by the center.

BASIC RULES GOVERNING THE MAINTENANCE OF RECORDS

There are several basic rules which are applicable to the keeping of records in day care centers. For convenience they can be divided into three areas of concern: (1) content; (2) access; and (3) storage.

With regard to content, the basic rule is that the records should contain only that information which is necessary, i.e., information required by law and by the need to operate the center in an effective manner. In general, information in the file should be factual in nature and should avoid the statement of opinions which are not clearly drawn from facts which appear in the file. Particularly to be avoided are comments about the personalities of children and their families and employees of the center, unless those comments are essential to the provision of services and are factual in nature. Gratuitous, non-factual negative statements about individuals can be considered libelous and may subject the person who made the statement and the center to civil liability for damage to the reputation of the person about whom the statement was made.

On the other hand, factual statements about an employee's job performance or a child's behavior may be nccessary to document later actions by the center and should be in the file. For information of a "borderline nature" which is important but potentially inflammatory if placed in the file, one possible recourse is for the person who had the information to keep a personal, private diary. A diary of this sort, when maintained privately and not shown to others, is generally exempt from most requirements of access to records.

There are two basic rules relating to access to records. The first is that, as a general rule, all information in the files is confidential. The second is that access to a file should be given to a person who is the subject of that file (or to a parent, in the case of a child). This rule of "free access" to the person who is the subject of the file underscores the need to ensure that the content of the file is appropriate and accurate.

Several general rules apply to the storage of records. First, the records should be secured against loss, defacement, tampering or unauthorized use. Second, they should be reviewed periodically and updated through the addition of new information and the removal of obsolete or inappropriate material. Third, after legal requirements governing the duration of maintenance are satisfied, they should be destroyed or otherwise removed (e.g., given to the agency which required them to be kept). Fourth, a permanent log should be kept in personal files, indicating the name of any person to whom information was released.

All of these rules should be set forth in a policy statement and given to persons to whom the policy is directly relevant, such as employees and parents of children served by the program.

BUSINESS RECORDS

In general, business records are the private property of the center and access may be limited to board members, authorized personnel and licensing authorities, if they are authorized to see them under state law. If a center receives public funding, it must make its records available to the funding agency, upon request. Business records must also be made available if subpoenaed by a court.

PERSONNEL RECORDS

These records are of a personal and confidential nature and access to them should be limited to authorized administrators. An employee should have free access to his/her record.

One exception to this general rule of confidentiality concerns requests for job references. The employer has the right to express an opinion about an employee. But that opinion must be carefully limited to the employee's performance on the job and should not go beyond that into irrelevant personal matters or information. Also, information in the file of a personal nature should generally not be released without the employee's consent unless it is clearly and directly related to job performance. One precaution to take when an employee is leaving the job is to have the employee sign a release allowing the employer to reveal any and all information in the file. This will reduce the employer's burden to decide which information is appropriate to release.

As in the case of business records, employee records can be subpoenaed by a court and the center must provide them. Failure to provide them can result in a finding of "contempt of court".

RECORDS ABOUT THE CHILDREN AND THEIR FAMILIES

As in the case of the other categories of records discussed, records about the children and families served by the center should be strictly confidential. Access should be limited to the family of a child who is the subject of a record, authorized staff and outside agencies with the legal authority to review the records. As in the area of personnel records, this degree of access makes it very prudent for a center to strictly control the content of the files, limiting it to information which is necessary.

If a center is receiving public funds for education, it will be subject to the Family Educational and Privacy Act of 1974 (sometimes referred to as the "Buckley Amendment") which requires the confidentiality and access discussed in the previous paragraph. If the funding is for special education services, there are additional requirements in federal and state special education laws which generally parallel what has already been said.

One exception to the general rule of confidentiality is a situation of suspected child abuse or neglect. Here, the requirements of the child abuse and neglect reporting laws supercede the right to confidentiality of the family

and allow information to be revealed concerning alleged abuse or neglect. As indicated in Chapter XIII on Responding To Suspected Cases of Child Abuse and Neglect, the center and its employees are generally protected from liability for releasing information in these cases through a special immunity included in child abuse and neglect reporting laws.

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